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William F. Winter

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December, 1950

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JOURNAL OF THE MISSISSIPPI STATE BAR

Member, National Conference of Law Reviews

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VOLUME XXII DECEMBER, 1950 NUMBER 1

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Entered as second class matter, November 25, 1936, at the Post Office at University, Mississippi, under the Act of Congress of March 3, 1879.
Published in October, December, March, and May
$4.00 Per Annum $1.00 per Current Number
EDITORIAL AND BUSINESS OFFICE, UNIVERSITY, MISSISSIPPI

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Mississippi Law Journal

Volume XXII December, 1950 Number 1

THE WORK OF THE 1950 SESSION OF THE MISSISSIPPI LEGISLATURE

*William F. Winter**

In an age when the major purposes of any state legislative process are dedicated in large measure to the two-fold task of the raising of revenue and the appropriation of funds, any attempt to appraise the work of the Mississippi Legislature of 1950 must of necessity take into account the importance of those fiscal affairs in the legislative scheme of things. The emphasis of those features is neither improper nor unusual. Virtually all of the legislation of a substantive or procedural nature is already on the statute books and requires only occasional revisions and modifications. This is not to say, of course, that the scores of non-appropriation and non-revenue bills which were passed by the legislature were unimportant and insignificant. On the contrary, many of those measures are of great significance and will prove of lasting importance. With only a few exceptions, however, every such general bill which was enacted into law was either amendatory of existing legislation or was passed in contemplation of subsequent revenue or appropriation measures.

Conceding that it is an oversimplification of the situation to state that the two major factors of legislating are concerned with taxation and appropriation, it is still possible to carry this basic outline one step further and cite that the two major governmental functions for which the financial structure is designed are the services of education and public roads. The place of those two phases of activity was brought into sharp focus during the recent session, for it was generally conceded that the outstanding legislative efforts were in those fields. Thus, any discussion which would seek to describe the highlights of 1950 legislative activity in Mississippi would be somewhat less than complete if it failed to mention the school and road legislation, the consideration of which encompassed virtually the whole of a three and one-half month regular session and, in the case of the highway bills, consumed in addition a special session of some five weeks.

The final results of the several months of effort on those matters were the passage of a long range pay-as-you-go highway and rural road building program, the authorization of a four-year medical school and teaching hospital, and the initiation of a Negro school improvement plan. In terms

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of expenditures to carry out the State's commitments in road-building and in education, considerably more than one-half of every State tax dollar will go into those fields of activity. Thus, measured in terms of importance and interest to the average Mississippian, the other accomplishments of the legislature necessarily suffer in comparison with those two monumental programs. For the purposes of this discussion, however, the intricate details of those broad and significant developments will be omitted, and only some of the measures which are deemed to be of direct interest to the members of the Bar in the practice of their profession will be considered.

To use a not entirely accurate criterion but one which further emphasizes the proposition that by far the largest quantity of legislation, except the local and private bills, was in terms of taxes or appropriations, it might be well to consider on a strictly numerical basis the bills having to do with those subjects. In the 1950 session of the legislature the records show that a total of 787 bills were passed by the two houses and signed by the Governor. Of these, 332, or nearly one-half, were local and private bills or bills of a local and private nature. Of the remaining 455, 233 were revenue or appropriation bills, and of the 233, 189 were appropriation bills and 44 were revenue measures. In the realm of strictly new regulatory legislation of the type which is of primary interest to the practicing attorney, the relatively small number of six bills became law. The number of amended statutes which the lawyer uses in his everyday practice was somewhat larger, since some fifty bills found their way through the legislative mill to alter existing laws. As a result of this entirely statistical analysis, it would seem, therefore, that little was accomplished that will be of interest to lawyers. This, of course, is far from true. Even though no major pieces of legislation such as the Workmen's Compensation Act, the Oil and Gas Conservation Act, or the Civil Practice Act, all of which came out of the 1948 session, were enacted in 1950, the cumulative legislation of the last session affords ample ground for study and consideration by members of the Bar.

Practice and Procedure

Unlike the rather sweeping reform effected in pleading in the circuit court by the 1948 legislature, no large-scale assault was launched on the existing rules of pleading by the last legislature. A number of changes were made, however, chief among these being the ones accomplished in Senate Bill 3, which modified and, as a matter of fact, rewrote Section 1310 of the Code.[1] This measure sought to expedite the procedure in chancery court by shortening the time in which cases shall become triable.

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[1]Griffith, Mississippi Chancery Practice § 20a (2d ed. 1950).

It is remembered, of course, that the old law provided that "after expiration of thirty days from the due date of the answer or answers the cause shall be deemed as triable."[2] There were then listed certain cases to which this rule did not apply, and which might be tried in a shorter period. Under the new law, however, the following language is used:

> "When the summons has been made returnable to a regular term of Chancery Court and has been personally served for a period of thirty (30) days before the return day, or, when service of the summons returnable to a regular term of Chancery Court is by publication and the date of the first publication is thirty (30) days prior to the return day and the publication has been completed in due course as required by law, the cause shall be triable at the return term. . . . When the summons has been made returnable to a rule day, the cause shall be triable on any day of a term, regular or special, after the due date of the answer or answers."

The reasons for the delay hitherto existing in the trial of cases seem to have had their basis mainly in the once generally used practice of taking depositions. Now, however, it is most infrequent that such a need for delay exists, and the effect of this new provision is, of course, to save considerable time in the trial of many cases. No longer will it be necessary to await another term of court in order to have cases tried, if the defendant has had as much as thirty days in which to answer.[3] This provision parallels very closely the circuit court law passed two years ago.[4] The effect of both is to insure a more expeditious and efficient disposition of litigation.

To hasten further the affairs of the chancery court, the matter of procedure during vacation was also considered in the revised statute. It was therein provided that in those cases in which the chancellor has authority to act in vacation and where a return date for process has been properly filed, "a cause shall be deemed triable, on its merits, on motion of either party, at any time after the due date of the answer or answers, either (1) in term time, or (2) in vacation upon a date to be fixed therefor by the chancellor by an order entered on the vacation minutes."

One other important feature of the act was the inclusion of uncontested divorce cases among those causes triable after only five days personal service of process or after the completion of publication, where the summons has been made returnable to the return term.

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[2]Miss. Code § 1310 (1942).
[3]Griffith, *op. cit. supra* note 1 §§ 283, 554, 555, 555a, 557, 558.
[4]Miss. Laws 1948, c. 229.

A constantly recurring procedural problem which apparently is not susceptible of entirely adequate solution is the nightmarish proposition regarding the commitment of persons to mental hospitals. This is a matter to which the State Bar Association has given considerable study in an effort to focus attention on the weak points of the existing law.[5] The 1950 session saw two major acts dealing with this problem enacted in an effort to eliminate at least some of the troubles which the courts, lawyers, patients, and mental institutions have all encountered at one time or another in the past under the old laws. That the last legislature completely succeeded in this endeavor is still a matter of some doubt, however.

The first of these new enactments, Senate Bill 19, is merely a rewrite of the highly controversial House Bill 5 of the 1948 session,[6] which represented a general revision of the then rather outmoded statutes. The major procedural features of the 1948 law remain generally unchanged in the new measure, and the largest modification occurred in the insertion of a section redefining the method of appointing a guardian for a person of unsound mind where such person is not actually committed to an institution. This provision, which alters and repeals Section 430 of the Code, was not a part of the 1948 act. Any relative, friend, or other interested party may apply to the chancery court in the county of the residence of the person of unsound mind for the appointment of a guardian for that person and his estate or either. The court, of course, may do this on its own motion. If the supposed lunatic has not been so adjudged, any interested person may petition the court for that purpose, setting forth the facts and declaring that the person does not require confinement or special treatment. A hearing shall then be held before the chancellor, and the person alleged to be of unsound mind shall appear and all interested parties shall be permitted to testify. From the evidence at such hearing, if it appear to the chancellor that the person is of unsound mind or incapable of caring for his estate and himself, the chancellor shall appoint a guardian of his person and estate or either. The costs of such a proceeding shall always be paid out of the estate of the person being adjudged, but in the event that no such estate exists, then it shall be paid by the person filing the petition.

Perhaps, the largest procedural change effected in the old law was the elimination of the formality of a lunacy hearing after a patient has been adjudged by the officials of a mental hospital to be in need of treatment. Under the new law the commitment order is made by the chancery clerk as soon as the hospital authorities report a finding of insanity.

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[5]See *Report of the Study Committee,* 20 Miss. L. J. 516 (1949).
[6]Miss. Laws 1948, c. 394.

A new section was added to the old law setting forth the manner in which the court may adjudicate a person's return to reason. This procedure simply amounts to the presentation of sufficient proof to the chancellor to satisfy him that the person has been mentally restored. This shall be done at a hearing either in term time or in vacation at which all interested parties may appear and give testimony. If the proof is deemed adequate, the patient will be released and his guardian will be discharged from further duties.

There were a number of other minor amendments to the law, such as the provision permitting rather than requiring the appointment of a guardian for a person adjudged to be suffering from a mental disorder but not needing hospitalization. In this same connection the new law requires both examining physicians to certify this condition rather than either one as heretofore. The sheriff is now expressly charged with the responsibility of conveying the patient through the various steps of the committing process from the initial examination to the delivery to the institution. In those counties having a health officer, he shall be one of the two physicians conducting the initial examination of persons alleged to be suffering from a mental disorder.

Coincident with the completion of the splendid new facilities for the treatment of alcoholics at the Mississippi State Hospital at Whitfield was the passage of Senate Bill 19, which is a comprehensive act setting forth the procedure for the commitment of alcholics and drug addicts. Such proceedings may be begun by the filing of a petition in chancery court by any friend or relative of such alcoholic or drug addict or by the county health officer alleging certain relevant facts about the case. The chancellor shall hear such matter either in term time or in vacation, and if the evidence presented establishes the need for the detention and treatment of such person in an institution, an order to that effect shall be entered. The period of such commitment was reduced to a minimum of thirty days and a maximum of ninety days, as compared with the former limits of six months and one year. The director of the institution is empowered, however, to retain patients for longer periods where the individual cases justify it. As a matter of fact, the director is authorized to release on probation or to discharge finally any patient at any time, notwithstanding the terms of the order of commitment. When a person fails to be rehabilitated after three commitments, the director may refuse to admit such person a fourth time. Additional safeguards which were written into the new law are contained in the provisions that all records pertaining to the commitment of any person shall be kept confidential. Section 12 of the act prescribes severe punishment for anyone who provides any person so confined with drugs or alcohol.

The handling of this type of cases has long been a source of difficulty, and a modification of the old laws has been sorely needed. However, because of the very nature of the problem involved, it is extremely doubtful that the new act will represent a cure-all for the various ills which have arisen in the past. The procedural machinery is not so ponderous as to forbid efficient operation. In fact, the greatest responsibility for the successful operation of this act lies in the good judgment and proper attitude of the medical directors of the two mental hospitals. With them lies the ultimate answer to the handling of this very vexing problem.

In the realm of circuit court pleading, one slight addition was made to the Civil Practice Act of 1948,[7] by providing that in answering, a defendant may deny the allegations of various paragraphs of a declaration merely by reference to those paragraphs.[8] Such a reference in the answer will serve to deny all of the allegations of the particular paragraph or paragraphs, except such as are specifically admitted. This modification of the existing law is in keeping with one of the original purposes of that law, namely, to render less laborious and tedious the task of drawing pleadings in the circuit court.

The matter of the venue of tort actions arising out of motor vehicle accidents on the highways and involving nonresidents came in for a share of attention in House Bill 742, which amends the existing law to extend the venue in such suits to the county of the plaintiff's residence. Formerly the venue in such situations was exclusively in the county where the cause of action accrued.[9] This marks the first time in the State that a plaintiff has the option of suing in his own county.

Three other measures dealing with procedural questions which should be mentioned are Senate Bill 124 and House Bills 623 and 113. The first merely adds a provision to Section 1644 of the Code to expedite to some extent the perfecting of appeals to the Supreme Court. The new matter permits, in those cases appealed from the county court to the circuit or chancery court and then to the Supreme Court, the transcript of notes prepared by the county court reporter to be included in the record transmitted to the Supreme Court. This renders unnecessary the recopying of such notes in the preparation of the record. House Bill 623 amends the old law to provide that writs of inquiry, in the cases of default judgments, may be executed either by the jury or by the judge, at the election of the plaintiff. Heretofore only the jury could perform this task.[10]

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[7]Miss. Laws 1948, c. 230. See also Griffith, *The New Mississippi Civil Practice Act—Its Background and Effect*, 20 Miss. L. J. 1 (1948).
[8]Advance Sheet 11, General Acts of Miss. 1950, S.B. 458.
[9]Miss. Code §§ 9363, 9364 (1942).
[10]Miss. Code § 1547 (1942).

House Bill 113 provides that in all suits against an agency of the State Government, wherein the attorney general is required to defend such agency, a complete copy of the declaration or bill of complaint must be mailed to the attorney general. Such a measure is designed to prevent the recurrence of situations prevalent in the past, where the attorney general was not always apprised of suits arising against a department of the State and, as a result, could not always take proper and timely steps to defend such suits.

Attorneys and the Judiciary

The overworked members of the Supreme Court received a measure of much-needed relief under the terms of House Bill 195 and Senate Concurrent Resolution 10, both of which received strong and valuable support from the State Bar Association. The beneficial effects of the former are already being felt, since three commissioners, appointed by the Governor, have already taken office. The bill provides that the commissioners shall "under such rules and regulations as the . . . . Supreme Court may adopt . . . . aid and assist said Court in the performance of its duties, and in the disposition of the causes now pending in the said Court undetermined and in the determination of such causes as may be presented to the said Court for determination." The commissioners shall possess the same qualifications as duly elected members of the court and shall receive the same salary. The office is appointive for a term of four years by the Governor, subject, of course, to the will of the people in ratifying the constitutional amendment proposed in Senate Concurrent Resolution 10.

That resolution, in a manner of speaking, seeks to make official the increase in the members of the court from six to nine. If this amendment is ratified in the November election, it will, of course, remove the necessity for the expedient of appointive commissioners. Upon its ratification and the subsequent election and qualification of the additional judges, the commissionerships provided for in House Bill 195 will automatically terminate, and the commissioners then holding office will be supplanted by full-fledged elected judges.

A new chancery court district was created by virtue of House Bill 157, whereby the old Fifth Chancery Court District, consisting of Hinds, Copiah, and Lincoln Counties, was divided. Hinds County alone remained as the Fifth District, and Copiah and Lincoln Counties served to form the new Fifteenth District. The large volume of chancery matters, particularly in Hinds County, prompted the change, which was advocated by most of the members of the Bar in the counties concerned.

The judicial salary scale was adjusted upward slightly, with the salaries of the chancery and circuit judges being increased from the $6,000 figure set by the 1948 legislature to a more respectable but still

minimal $7,500 annual sum. Provision was also made for the increased reimbursement of attorneys appointed by the court to defend in capital cases. Under the terms of Senate Bill 175, an attorney for a defendant in such a case who pleads guilty may receive $75.00. For actually conducting a trial in circuit court, he may receive $150.00, and for actually prosecuting an appeal to the Supreme Court, he may be awarded $250.00.

Some attention was given to enlarging the jurisdiction of county courts. House Bill 291 tripled the jurisdictional amount for such courts, by providing that the amount of the thing in controversy shall not exceed $3,000, exclusive of interest and costs. Previously this figure had been only $1,000. The same act also raised the population requirements for the setting up of a county court. In order for a county to automatically qualify to maintain a court now, it must have within its borders a municipality of a population of at least 10,000, instead of only 5,000 as before. Senate Bills 78 and 79 extended to county courts the authority to suspend sentences in misdemeanor cases on the same terms as circuit courts now exercise such authority.

Two bills pertaining to county attorneys were passed during the session. Directly affecting county prosecutors was House Bill 883, which precludes the county attorney from defending anyone in a criminal case in any court in the State. Heretofore municipal courts were not expressly included in the prohibitions set up in the law. Under the terms of House Bill 540, counties which have abolished the office of county attorney may employ a "competent attorney" to prosecute in special cases arising in the county.

Property

The major enactment in the field of property law was the adoption by the State of the uniform law on trust receipts and pledges of personal property. This law is a rather lengthy and necessarily technical statute, which was drafted originally by Professor Llewellyn of Columbia University and which has been passed by the legislatures of a number of states. There has been a recognized need for several years, particularly in the commercial states, for uniformity among the states in the matter of handling trust receipt transactions. The needs of business in this field demands a procedure which is sufficiently facile to afford ease in handling goods, while at the same time affording the entruster adequate security and providing other creditors of the trustee with ample notice. It is this latter feature particularly which is important in the consideration of this act. Instead of requiring the recording of each individual trust receipt as if it were an ordinary mortgage, the law provides only for the filing with the chancery clerk of notice that trust receipt financing of a dealer is, as to certain goods, being carried on by a named financier. The act is

applicable only to those transactions constituting a regular course of business and does not apply to individual acts of this nature. The effect of the act was summarized in the *Fordham Law Review*[11] as follows:

> "The act recognizes the trust receipt transaction as an independent form of security transaction separate and apart from the familiar pledge, chattel mortgage and conditional sale.
>
> It gives to the entruster who finances the purchase of goods in the course of trade from producer to retailer adequate protection against insolvency of the trustee, while at the same time, it throws upon the entruster the risk of dishonest dealing by his borrower.
>
> It gives pledgees and mortgagees, whose business it is to investigate, a better chance to ascertain the true situation than they had at common law without burdening the entruster with expensive filing.
>
> It gives to good faith purchasers for new value who rely upon the trustee's possession greater protection in some cases than they had at common law without lessening that protection in any case.
>
> In its proper field it should facilitate and make more safe the trade in goods, to the general benefit of the business community and of the public."

Senate Bill 73 amended Section 478 of the Code to give to widowers the same right to enjoy the use of exempt property of their deceased spouses as only widows formerly had enjoyed. Hereafter no such property shall be subject to partition or sale for partition during the widowerhood of the person holding it, so long as the widower uses it and occupies it.[12]

By the terms of Senate Bill 564, the amount allowed for homestead exemption under the provisions of Section 317 of the Code was increased from $3,000 to $5,000. House Bill 646 extended the validity of chattel mortgages from twelve months to thirty-six months.[13]

House Bill 8 amended Sections 1074 and 1075 of the Code pertaining to liability for the cutting of certain timber on the lands of another without the consent of the owner. The penalty was not altered, but the burden of proof was shifted almost completely. Instead of requiring the owner to establish by a preponderance of proof that the cutting was "wilfully,

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[11]Bacon, *A Trust Receipt Transaction*, 5 Fordham L. Rev. 240 (1936).

[12]For discussion of purposes behind original statute see Bohn v. Bohn, 193, Miss. 122, 5 So.2d 429 (1942); Miers v. Miers, 160 Miss. 746. 133 So. 133 (1931).

[13]See Miss. Code § 851 (1942).

recklessly and knowingly" done, the entire burden is now upon the defendant to show that he acted in good faith. This modification in the law is the apparent result of a great many cases dealing with this subject in which it has proved impossible to establish a "preponderance of proof" necessary to show liability.[14] All that the injured party need show under the new law is "that such timber belonged to such owner, and that such timber was cut by the defendant, his agents or employees without the consent of the owner. . . ."

Criminal Law

As a general rule, criminal statutes have not been the subject of much legislative attention within recent years, and the 1950 session was no exception in this regard. Unquestionably the major enactment touching upon the field of criminal law was Senate Bill 468, which dealt with the matter of the parole of convicts. This act is a rewrite of the Parole Act of 1944.[15] Its main features are directed toward the extension of the duties of the Parole Board and toward making the board a full-time organization. Careful attention is given in the new law to the method of selecting the members of the board. There is expressly written into the act the provision that the members shall be appointed "without regard to their political affiliations." In addition, to help the Governor select competent persons, there was set up a nominating committee composed of the attorney general, the director of the State Department of Public Welfare, the chief justice of the State Supreme Court, the president of the State Bar Association, and one person appointed by the Governor. In the final analysis it is not mandatory that the Governor take the recommendations of this group, however. Furthermore, with the purpose in mind of improving the work of the board, the law now requires one member to live at the State Penitentiary.

The board is charged with the duty of studying the record of every prisoner within one year of his commitment to the penitentiary. Personal interviews may be had with prospective parolees before a parole is granted, but no prisoner may be paroled until the board is satisfied that adequate arrangements have been made for his proper employment. It is stated in Section 9 to be a matter of policy that: "A parole shall be ordered only for the best interest of society, not as an award of clemency; it shall not be considered to be a reduction of sentence or pardon."

The minimum time limit before one is eligible for parole was doubled from nine months to eighteen months. A special provision to take care of

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[14]Rector v. Outzen, 93 Miss. 254, 46 So. 408 (1908); Leavenworth v. Hunter, 150 Miss. 750, 117 So. 122 (1928).

[15]Miss. Laws 1944, c. 334.

sex offenders was inserted, requiring that each such person must be examined by a competent psychiatrist before being released on parole.[16] There is a further section dealing with appeals in the case of a revocation of a parole. Such appeal must be made in writing to the board, and the board may then determine whether the parole shall be terminated. In the event that it is, the prisoner must serve the remainder of his original sentence, and the time spent on parole will not be taken into account to diminish the term. Finally, there is written into the law a statement of legislative intent with respect to the act in relation to the constitutional pardoning power of the Governor.[17] It is stated in effect in Section 16 that it is not the intent of the act to interfere with the power of the Governor in that regard but suggests that in order for the law to be effective, the Governor should consider the recommendations of the Parole Board before exercising his authority.

In another phase of criminal law, House Bill 161 made more stringent the penalty in the so-called "bad-check" law.[18] The 1948 legislature had raised the fine from one hundred to five hundred dollars and the maximum term of imprisonment from thirty days to six months. At the last session, however, the offense was made a felony in those cases where the check or draft is twenty-five dollars or more, and the penalty in such cases was made a maximum of a five hundred dollar fine and three years in the penitentiary.

The statute pertaining to inquests was strengthened as a result of House Bill 302, which amends Section 3902 of the Code to make it mandatory that in "any case of death where it appears that the death may have resulted from criminal means," the coroner is required to order an autopsy performed. This must come, however, only on the written authority of the district attorney or the county attorney.

Workmen's Compensation

When the legislature in 1948 passed the Workmen's Compensation Act,[19] the lawmakers were treading on unknown ground. They could only turn to the experiences of the other states and attempt to place in the Mississippi act what were considered to be the best features of the laws of the other jurisdictions. That they produced a workable act is attested by the fact that the 1950 legislature did not see fit to effect a single major change in the law of two years ago.

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[16]A special sex crimes bill, House Bill 311, was passed by the House of Representatives, but did not secure Senate approval.
[17]Miss. Const. § 124.
[18]Miss. Code § 2153 (1942).
[19]Miss. Laws 1948, c. 354.

There were a number of amendments placed in the original act, but they were for the most part minor alterations designed to assist the commission in the administration of the act. In almost every instance the changes were made on the recommendation of the commission.

The amendments which are probably of the greatest significance are the following: (1) the inclusion of the agencies, institutions, and departments of the state and local governments within the scope of coverage; (2) a clarification of the provision pertaining to the awarding of attorney's fees; and (3) a removal of the ambiguity with reference to the determination of the number of employees of contractors where subcontractors are involved.

When the original act was enacted in 1948, all agencies of government were pointedly omitted from its application. This was in sharp contrast to the provisions of the laws of most other states. Under the recently adopted amendment, however, "any state agency, state institution, state department, or subdivision thereof, including counties and municipalities or the singular thereof, . . . may elect by proper action of its officers or department head to come within [the Workmen's Compensation Act] provisions." There is a further provision that any of the above named units may bear three-fourths of the costs of insurance and the employees one-fourth. It is, thus, seen that the status of government employers is quite different from that of private businesses inasmuch as the application of the act is on a strictly voluntary basis and the employees bear a substantial part of the cost of providing coverage for themselves. This, of course, is merely a continuation of the distinction which has been recognized in the common law attitude concerning the liability of the agencies of government. To paraphrase an old maxim, it would seem that under the present workmen's compensation concept, "the king can afford to admit a wrong if he is covered by workmen's compensation insurance."

One of the most unpopular features of the workmen's compensation system has been the matter of attorney's fees. Some of that unpopularity stemmed, of course, from the abolition of the so-called "damage suit" practice in the master and servant field. This change must be accepted as one of the incidental effects of workmen's compensation and certainly cannot be counted as an effective or valid argument against the law. In addition, however, there has been some well-founded criticism that the original act did not sufficiently define who was eligible to practice before the commission, what fees would be allowed, and how those fees could be collected. Under the act as now amended, anyone representing another before the commission must be qualified to practice in the courts of the State and is bound by the statutes regulating the practice of law. A fixed

limit of twenty-five per cent of the total compensation award was specified as the maximum fee to be allowed an attorney by the commission. This amount may be supplemented, however, by fees subsequently allowed for additional services in appealing to a higher tribunal. Provision was also made in the amended law to provide, on final award of compensation, for a partial lump sum settlement in the amount of the attorney's fee to be made immediately from the last payments due the beneficiary.

Perhaps, the most ambiguous provision in the original act was the last paragraph of Section 4, which has to do with subcontractors. There was no indication anywhere in the law as to whether the number of employees of the subcontractor alone, the contractor, or both combined was to be the standard in determining liability. As amended, the law now provides that the subcontractor's employees only may be counted in ascertaining whether the law will apply.

There were a number of other changes effected in the act, but they are largely administrative in their operation. Section 9(g) was amended to provide a presumption of total dependency in the case of a surviving wife, child or children, while the degree of dependency of all others is to be determined from the facts without any presumption being indulged in. That section follows Section 2(18) of the old law which provided for a presumption of dependence of the widow, widower, and children under eighteen. This has also been amended to require the widower to be "suffering a mental or physical handicap" before a presumption of dependency can be reached with regard to him. In addition a seemingly unnecessary provision requiring the insurer to remove such a presumption by a "preponderance of evidence" was stricken from the old law.

The definition of "widow" was enlarged somewhat in the amended law, and now "one not a legal wife, but who had entered into a ceremonial marriage with the decedent at least one year prior to his death, and who on the date of the decedent's death stood in the relationship of a wife, provided there was no living legal spouse who had protected her rights for support by affirmative action [filing suit for separate maintenance or alimony within three years of separation] as hereinabove required" is entitled to compensation.

In Section 4 of the old law the more legalistic term, "proximate cause," was substituted for the word, "occasioned," in the reference concerning the effect of the intoxication of an employee on his injury. Now there is no liability if the "intoxication of the employee was the proximate cause of the injury. . . ."

There were a number of amendments designed to liberalize the act slightly. The minimum weekly payment was increased from seven dollars

to ten. An employee may have an examination by his own physician in an amount up to one hundred dollars, whereas formerly the limit was ten dollars. The provisions with regard to hernia cases were altered so as to make recovery somewhat easier. The three hundred fifty dollar funeral allowance was made expressly exclusive of any burial insurance or benefits. Where there is a surviving child or children but no dependent wife or husband, the amount which each child should get was increased from fifteen per cent to twenty-five per cent. At the same time the amount to which a dependent parent or grandparent is entitled was decreased from twenty-five per cent to fifteen per cent.

New provisions pertaining to the commission itself include the requirement that one member of the commission shall be an attorney at law "of recognized ability with at least five years active practice in Mississippi prior to his appointment." The duties of the chairman are more definitely defined, and some of the additional employees of the commission are explicitly provided for in the law.

It will undoubtedly be necessary to amend the act from time to time. Only in the light of experience can all of the needs be determined and written into law. As a general proposition, however, it would seem that the basic features of the 1948 law will remain unchanged, and so long as the act continues to be administered in a sensible and efficient manner, as it presently appears to be, no one should have any doubts concerning it.

Oil and Gas

Another major piece of 1948 legislation which drew considerable attention before and at the time of its passage was the Oil and Gas Conservation Act.[20] As in the case of the Workmen's Compensation Act, this law went through the 1950 session practically unchanged. Only one major amendment was made during the session. That modification had to do with what is probably the most controversial feature of the entire law, namely, the compulsory unitization provision. Section 10 of the original act limited the mandatory integration of interests to a drilling unit of forty acres.[21] Under the amendment contained in Senate Bill 148 of the 1950 session, this acreage limitation was removed, and the Oil and Gas Board can now order such integration for a unit of any size "for the prevention of waste or to avoid the drilling of unnecessary wells." One other change in the law, but of lesser importance, increases the length of time which an emergency order of the board may be in effect without a hearing. Under

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[20]Miss. Laws 1948, c. 256.

[21]See Coleman, *The New Mississippi Oil and Gas Conservation Act,* 20 Miss. L.J. 58 (1948).

the 1948 act the limit was fifteen days, but this has now been increased to forty-five days.

House Bill 126 is another measure dealing with the pooling and unitization of interests. This bill is designed exclusively for the agencies of the State and its political subdivisions to enable them to enter into agreements for the cooperative development of mineral interests owned by them. Any field-wide unitization agreements, however, are naturally subject to the approval of the Oil and Gas Board.

An act aimed at removing some of the difficulties encountered in the conveyance of undivided mineral interests where one or more of the owners of such interests cannot be located was passed as Senate Bill 2. This measure merely extends the power of the chancery court to appoint as receiver the chancery clerk of the county where the land or a part thereof is located, if "the court is satisfied after hearing and proof that the defendant, or defendants, resident or non-resident, could not be found after diligent search and inquiry and that petitioners will suffer substantial damage or injury unless such receiver is appointed." The petitioners in such a proceeding must, of course, claim to own an undivided mineral interest in the land. A receiver so appointed is empowered to execute a lease of the mineral interest, for which he has been named receiver, on such terms as the court prescribes, and he is further charged with impounding for the use of the absent owner any monies which may be received for such lease. His official bond and any additional bond which the court may require shall stand to cover the monies so collected. There must be a valid service of summons or service by publication before a receiver may be appointed, however.

Corporations

Under the provisions of Senate Bill 394, the period of existence of corporations was increased from fifty years to ninety-nine years.[22] It was further provided that any presently existing corporation, the charter of which had expired prior to the passage of the act, could, by the continued doing of business for ninety days after the passage of the act, continue as a de jure corporation for the full period of ninety-nine years just as if its charter had been formally amended. This same privilege was extended to all fifty-year corporations whose periods of existence have expired or will expire after the passage of the act.

Senate Bill 396 repealed Section 5334 of the Code, which established the invalidity of mortgages or deeds of trust on franchises, income or future earnings of corporations as against any debts incurred in the operat-

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[22]See *Report of the Study Committee, supra* note 5 at 517.

ing of the corporation. This measure, which bore the stamp of approval of the Study Committee of the State Bar Association, should prove helpful in making corporate financing more satisfactory in many instances.[23]

A new procedure whereby cooperative associations may change to the corporate form of organization was prescribed in Senate Bill 646. Any such change must first be approved by a two-thirds vote of all of the members of the board of directors, following which the projected amendment must be submitted to a vote of the stockholders. Upon approval by a majority of the stockholders, the change shall be certified by the president and the secretary and shall then be filed with the secretary of state, who shall handle it in the same manner as any other corporate charter.

Public Officers

One of the few completely new pieces of regulatory legislation passed by the 1950 legislature was the Subversive Activities Act.[24] This law, as originally introduced, sought merely to define "subversive persons"[25] and "subversive organizations,"[26] prohibit such persons from holding any public job in the State, and require a certificate from all persons holding a public position to the effect that they are not "subversive persons" as defined in the act. All agencies of the State and its political subdivisions are charged with the duty of ascertaining by all reasonable and proper means whether or not anyone appointed or employed by them is a subversive person. Anyone who refuses to subscribe to the condition of signing the anti-subversive certificate or anyone who admits that he is a subversive person shall be discharged immediately from whatever public post he might hold. Moreover, "reasonable grounds on all the evidence to believe that any person is a subversive person . . . shall be cause for dis-

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[23]*Ibid.*

[24]Advance Sheet 5, General Acts of Miss. 1950, H. B. 450.

[25]Section 1 of the Act defines "subversive person" as follows: "Any person who commits, attempts to commit, or aids in the commission, or advocates, abets, advises or teaches by any means any person to commit, attempt to commit, or aid in the commission of any act intended to overthrow, destroy or alter, or to assist in the overthrow, destruction or alteration of, the constitutional form of the government of the United States, or of the State of Mississippi, or any political subdivision of either of them, by revolution, force, violence, or other means not provided for or sanctioned by the Constitution of the State of Mississippi or the Constitution of the United States; or who is a member of a subversive organization or a foreign subversive organization."

[26]Section 1 of the Act also defines "subversive organization" as follows: "Any organization which engages in or advocates, abets, advises, or teaches, or a purpose of which is to engage in or advocate, abet, advise, or teach activities intended to overthrow, destroy, or alter, or to assist in the overthrow, destruction or alteration of, the constitutional form of the government of the United States, or of the State of Mississippi, or of any political subdivision of either of them, by revolution, force, violence, or other means not provided for or sanctioned by the Constitution of the State of Mississippi or the Constitution of the United States."

charge from any" appointive job. Every person who is a candidate for office in the State must file an affidavit with the secretary of state or the circuit clerk, as the case may be, to the effect that he is not a subversive person. It is specifically set forth in Section 9 of the act that any material misstatement of fact in connection with any of the statements required under the provisions of the act will render the person making such misstatements subject to the penalties of perjury as prescribed by law.

Sharp penal teeth were placed in the act by amendment on the floor of the House of Representatives to provide for the punishment of any person who would seek to overthrow the government of the United States or of the State of Mississippi by "revolution, force, violence, or other means not provided for or sanctioned by the Constitution of the State of Mississippi or the Constitution of the United States." Furthermore, any conspiracy to accomplish an unlawful alteration of our form of government was made punishable in a like manner. Finally to "advocate, abet, advise, or teach by any means any person to commit, or assist in the commission of any act intended to overthrow, destroy, or alter the constitutional form of government of the United States or the State of Mississippi or of any political subdivision [of either] . . . under such circumstances that same shall constitute a clear and present danger to the security of the United States or of the State of Mississippi or of any political subdivision of either of them" was made punishable by a lesser penalty.

A constitutional amendment to permit the state auditor to succeed himself was proposed in Senate Concurrent Resolution 24. Subject, of course, to ratification at the general election in November, the amendment was thought to be in keeping with the idea of attempting to professionalize the administration of state government. The one-term principle is apparently based on the idea of a lack of trust in the continuation in office of one man. The inevitable result of such a doctrine, however, is usually inefficiency in government, since there is ordinarily a virtually complete turn-over in personnel every four years.

In the salary field, future governors will receive the amount of $15,000 annually, instead of the present sum of $10,000, while members of subsequent legislatures will be reimbursed at the rate of $2,000 per session, as compared with the $1,500 which is now paid. Attendance at special sessions will be compensated in the amount of fifteen dollars per day, which represents a one dollar increase over the previous scale. The salary of the lieutenant governor was also increased from $2,000 per session to $3,000.

Suffrage and Elections

The third amendment proposed to the State Constitution at the 1950 session came in the form of House Concurrent Resolution 10 and provides

for the wives of ministers to vote after only six months residence in an election district.[27] This merely extends to clergymen's wives the same privilege which had previously been extended to their husbands. Such a change was submitted to the people in 1948 as a part of a more far-reaching change in the voter-qualification provisions of the Constitution, and was defeated.

The absent voter law was extended to qualified electors unable to go to the polls by reason of physical incapacity. Under the terms of House Bill 191, such voters may now exercise the right of suffrage by pursuing virtually the same procedure used by occupational absentees. This, of course, contemplates the filing of a sworn application for a ballot within twelve days of the election and also the signing of an affidavit to accompany the ballot designating the person who will deliver it to the election officials. A further occupational extension of the law was made by permitting wives who accompany their husbands on business trips to vote on the same terms as their husbands. The general procedural steps provided in the former law were retained without amendment. The main purpose of House Bill 191 was merely to extend the privilege of absentee voting to another group of citizens, who have heretofore been unable to enjoy that privilege.[28]

One of the most widely publicized acts of the session was the so-called "party supremacy" bill which was passed amid rather heated remarks on both sides of the Mississippi political fence. The ultimate effect of the measure has been only to require the registration with the secretary of state of all duly organized political parties in the State and to forbid to all parties the use of any part of the name of any other party. Thus, whereas in Mississippi there were two groups claiming to be the "Democratic Party," the act as passed gave legal recognition only to that group which was first to register with the secretary of state. There are a number of sections in the bill, but they are concerned mainly with spelling out the legislative intent behind the act. Despite the furore caused by its passage, it is hardly to be expected that it will have the far-reaching effect predicted at the time of its enactment.

Municipal and County Government

Acting on a mandate from the 1948 legislature, two joint legislative recess committees, one in the field of municipal government and the other in the field of county government, presented to the 1950 session a number of recommendations which resulted in a general recodification and re-

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[27]Miss. Const. § 241.
[28]*See* Miss. Laws 1944, c. 174.

vision of the State's laws regulating municipalities and counties. It is manifestly impossible in a discussion of this type to examine in detail the various bills which were passed as a result of the efforts of those two committees. Some eighteen bills dealing with virtually every phase of municipal activity were approved, and ten measures affecting various aspects of county government were enacted. It will be practicable here, therefore, only to point out some of the major provisions of those acts.

In the municipal field the most comprehensive of the acts was House Bill 71, which was the omnibus recodification bill. Foremost in importance in this measure are the sections having to do with the creation, abolition, and expansion of municipalities. Most of these features were completely rewritten with the end in view of simplifying to as great a degree as possible the method of incorporating municipalities and the enlargement and contraction of their boundaries. Hereafter no municipal corporation may be created which does not have at least three hundred inhabitants. In the matter of appeals from actions of incorporation or boundary alteration, the forum is now the chancery court instead of the circuit court. As for the election of municipal officials, uniform dates for holding such elections and uniform four-year terms were prescribed for all municipalities. All terms of office will henceforth begin on July 1. A sweeping reform in the municipal judicial system is that effected in the abolition of the practice of making fees and costs payable to municipal officers in criminal cases. Under the new method, the officers will receive a salary, without having to rely on a share of the fees as remuneration for their services. In addition, the statutes were broadened so as to make them applicable to the commission form as well as to the code charter form of government. Another step forward was taken in the change made in the manner of the publication of ordinances. Hereafter no ordinance shall be in effect unless it shall have been properly entered in the ordinance book.

House Bills 72 and 77 undertook to rearrange the laws pertaining to municipal ad valorem taxation. The main purpose of the former was to simplify and correlate the tax laws, which heretofore have, for the most part, been in the chapter on homestead exemption. They now follow the general pattern prescribed for the assessment and collection of state and county ad valorem taxes. House Bill 77 widened the tax base in the ad valorem field by removing some of the statutory limitations which had been previously imposed on the authority of municipalities to assess ad valorem taxes for school and general purposes.

House Bills 72, 77, and 255 are all concerned with the matter of bond issues. The first two deal with the problem on the municipal level, while House Bill 255 affects the counties. In House Bill 72 all of the

scattered and conflicting laws pertaining to the issuance of municipal bonds were rewritten and placed into one unified act. Perhaps the outstanding change in the old statutes was in requiring the approval of three-fifths of those voting for the issuance of bonds rather than a majority of the qualified electors, as heretofore. In this respect, the municipal law represents an adaptation of that feature of the county laws. In House Bill 74 the problem of school bond issues was dealt with, and this law similarly is a re-write of the basic provisions of existing laws, with the conflicting features removed and a unified approach adopted. On the county side, House Bill 255 served to give the old laws relating to county bond issues a much-needed face-lifting. Section 1 of that bill redefines the purposes for which county bonds may be issued. In succeeding sections the procedure to be followed and the limitations to be observed in issuing such bonds are restated with considerably more clarity and definiteness than had existed before.

In the past both counties and municipalities had operated under the same budget law, with generally unsatisfactory results. A separate mandatory municipal budget system was provided for under the terms of House Bill 79, and a completely revamped county budget law was enacted as House Bill 261. Both acts set up the fiscal year to run from October 1 to September 30. One noteworthy feature of the municipal budgeting law prohibits the expenditure during the last quarter of the final year of a municipal administration of "a sum exceeding one-fourth (¼) of any item of the budget made and published by it except [in certain cases of emergency]." This provision is borrowed from the county law in that regard. It is further provided in the municipal law that a competent audit be made annually of the fiscal records of every municipality under a uniform formula established by the state auditor. In view of the financial difficulties which many municipalities have come upon in recent years, it seems probable that the institution of a mandatory uniform budget system in municipal government will prove helpful in enabling some cities and towns at least to operate their governments more economically, while in the county government field the revision of the previously existing laws with respect to the budgeting process will unquestionably make for more efficient financial planning there.

Section 8367 of the Code is a statute which has been a source of difficulty and out of which numerous suits have arisen between cities and counties. This is the law which provides for the distribution of road taxes collected by a county on property within a municipality. Under the terms of House Bill 88, the practice of permitting the county to maintain the city streets or a part of them in lieu of the distribution of the tax monies with the city is legalized. Further, the new law provides that in those counties where the foregoing practice is not engaged in the county

collector shall isolate the municipality's proportionate part of the collections and shall transfer them into the municipal treasury each month.

A modernization of the statutes dealing with the acquisition and operation by municipalities of public utility systems was the purpose and effect of House Bill 75. Up until the passage of that bill, several alternate procedures were permissible for the acquiring of and the issuance of bonds for such utilities, but actually such additional provisions were a source of confusion rather than assistance. The present act clarifies and simplifies to a considerable degree the statutes with reference to this aspect of city government. House Bill 76 serves practically the same purpose with respect to assessments for special improvements and the issuance of bonds therefor.

A more workable manner of transferring municipal surplus funds was set up in House Bill 87, wherein it was provided that an amount of one hundred dollars or less may be transferred merely by an order of the governing authorities. In greater amounts the former practice of publication is retained, but in the event of a protest by twenty per cent of the qualified electors, the procedure now is to require authorization by an act of the legislature rather than through a special election. This is designed to eliminate the added expense of special elections, and actually has the effect of removing an intermediate step in the process of legalizing the transfer of surplus funds, inasmuch as the legislature has in the past been called upon through numerous local and private bills to approve such transfers anyway.

House Bill 82 revises the laws relative to the creation of fire districts and permits two or more municipalities to combine in the formation of such a district. Senate Bill 56 empowers municipalities to promulgate certain regulations pertaining to the zoning of areas in and around airports, such as the regulation of the height of structures built in such areas.

Several other bills affecting the government and welfare of municipalities were passed during the course of the session, but except for two or three less important statutory revisions, all of the others were concerned with providing additional revenue for the hard-pressed town and city governments. These money-raising projects ranged from a one-half cent sales tax for some of the larger cities to another so-called "pork barrel" fund of $1,500,000, in which all of the municipalities share according to population.

Among the other measures affecting county government were bills with respect to the awarding of contracts for the construction and maintenance of roads and bridges and bills limiting the amount of indebtedness which counties may incur for the purchase of machinery.

Interstate Compacts

In the field of interstate cooperation three acts were passed by the 1950 legislature dealing with such widely different subjects as fishing, bridge-building, and education.[29] Work in the last-named field is probably of greatest significance to most Mississippians, inasmuch as the State of Mississippi, under the terms of Senate Bill 440, became a full-fledged member of the Southern Regional Education Council. Such a compact amounts to the pooling of the best professional school facilities in the south for the use of students from all of the participating states. This arrangement is particularly helpful to Mississippi, which has no dental or veterinary schools and which does not yet have in operation a four-year medical school.

The other acts of an interstate nature were Senate Bill 61 authorizing Mississippi's participation in the Gulf State Marine Fisheries Compact, and House Bill 405 providing for the States of Mississippi and Arkansas to enter into a compact for the purpose of constructing a toll bridge across the Mississippi River. The Fisheries Compact is the product of the efforts of the Council of State Governments to secure the cooperation of all the states bordering the Gulf of Mexico in the preservation and conservation of the fishing resources in the coastal waters. The Mississippi-Arkansas Bridge Compact enables the setting up of proper machinery for financing and constructing a much-needed bridge across the Mississippi River in the vicinity of Friars Point.

These acts clearly indicate a marked trend on the part of the State to enter into cooperative agreements with neighboring states for the accomplishment of purposes which no one state can do alone. This seems to be a most healthy manifestation of the true spirit of "states' rights" in that the states themselves, by voluntary cooperation, are meeting those problems, the solutions for which are too often sought through the channels of tht Federal Government.

Banks and Banking

House Bill 125 did not materially alter the law with respect to joint depositors, but it did serve to enlarge Section 5205 of the Code by adding the following thereto: "The death of the drawer of a check upon a deposit in a bank shall not operate as a revocation of the authority of a bank to pay a check bearing the authorized signature of a depositor until after thirty days after the death of such depositor or thereafter until the bank

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[29]For discussion of interstate compacts, see Murphy, *The Interstate Compact to Conserve Oil and Gas: An Experiment in Cooperative State Production Control,* 17 Miss. L.J. 314 (1946).

has notice of the death from a duly and legally appointed and qualified executor or administrator." In addition, the amount which a bank is authorized to pay the next of kin of a deceased depositor without the necessity of administration was raised from three hundred dollars to five hundred.

A measure designed to spell out precisely the rights and duties of a bank with respect to the payment and dishonor of demand items was passed in the form of House Bill 462. This act provides that any bank which receives such an instrument, other than for immediate payment over the counter, and gives credit for it before midnight on the day on which it is received has until midnight of the following day to dishonor it or refuse payment on it. Of course, the term "day" refers to a full and regular business day.

Taxation

While there were a great many acts passed with regard to the tax laws of the State, House Bill 992 seems to be the only measure in the taxation field which has a special interest for members of the Bar. This act writes into the Mississippi income tax statute the Federal provision with respect to the involuntary conversion of property. The new language which has been added is as follows:

> "If property (as a result of its destruction in whole or in part, theft or seizure, for an exercise of the power of requisition or condemnation, or the threat or imminence thereof) is compulsory or involuntarily converted into property similar or related in service or use to the property so converted, or into money which is forthwith in good faith, under regulations prescribed by the commissioner with the approval of the governor, expended in the acquisition of other property similar or related in service or use to the property so converted, or in the acquisition of control of a corporation owning such other property, or in the establishment of a replacement fund, no gain shall be recognized, but loss shall be recognized. If any part of the money is not so expended, the gain, if any, shall be recognized to the extent of the money which is not so expended (regardless of whether such money is received in one or more taxable years and regardless of whether or not the money is not so expended constitutes gain.)"

Insurance

The only bill in the field of insurance law was Senate Bill 158, which amended Section 5687 of the Code to permit minors of the age of fifteen or more to contract for life insurance on any person having an estate in

which such minors are to participate. In addition, the section was extended to provide that in the case of minors under fifteen years, the guardian is empowered to take out such insurance for the benefit of the ward on the life of any such person. In either case the chancery court, of course, must approve the action.

Conclusion

While the 1950 Mississippi Legislature will doubtless be remembered more for its tangible material accomplishments in the form of improved highways and better schools than for its efforts in the field of substantive and procedural law, the foregoing picture of the work in the latter field should afford ample proof of the achievements in that direction. Many other worthy measures, such as the bill to raise the standards for admission to the Bar, were forced to die on the calendar because of the press of what was considered other more important legislation. It will be for succeeding legislatures to take up those matters in due time. As for the work of the 1950 session, it is believed that the legislation which has been discussed represents in virtually every instance a needed and helpful addition to the statute books of the State.

RECENT AMENDMENTS TO THE MISSISSIPPI WORKMEN'S COMPENSATION ACT

*Frank E. Shanahan, Jr.**

A number of changes were made in the Mississippi Workmen's Compensation Act by the Mississippi Legislature in its 1950 session.[1] While these amendments were rather numerous, they seem to have been aimed more toward liberalizing and clarifying the Act rather than basically changing it. The purpose of this article is to point out these various amendments and rather generally discuss the effect of each of them upon the Act as originally written.

Scope of Coverage

Public employees were not specifically covered under the provisions of the Act as originally written.[2] When the Attorney General ruled that they could not be covered by election, the benefits of the Act were denied them completely.[3] However, by amendment the benefits of the Act are extended so as to provide coverage for both private employees and public employees. While it is not mandatory that the employer of public employees provide them with coverage, "any state agency, state institution, state department, or subdivision thereof, including counties and municipalities, or the singular thereof, . . . may elect by proper action of its officers or department head to come within its provisions . . ." In the event such an election is made, notice is required to be filed with the Mississippi Workmen's Compensation Commission informing it that workmen's compensation insurance has been obtained by such unit with an authorized carrier. With regard to the payment of the premium for such workmen's compensation insurance policy, it is specifically provided that only seventy-five per cent (75%) of such premium shall be paid from appropriated or other funds, and twenty-five per cent (25%) of such premium must be paid by the public employees who are the beneficiaries under the policy.[4]

Another change of importance is the one which provides a specific manner by which any member of a partnership, firm, or association, or officer of a corporation can obtain coverage under the Act along with his employees.

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[1]House Bill No. 433, Regular Session (1950).

[2]Miss. Laws 1948, c. 354, § 3; Miss. Code § 6998-03 (1942).

[3]Opinions of the Miss. Attorney General, December 30, 1948.

[4]Miss. Laws 1948, c. 354, § 3, as amended; Miss. Code § 6998-03 (1942), as amended.

That section of the Act which required them to be counted in determining whether the business employed regularly a sufficient number of workmen or operatives to come within the compulsory provisions of the Act has been eliminated.[5] However, it is now provided that, where there is coverage for fellow employees under the provisions of the Act, any member of a partnership, firm, or association, or officer of a corporation may elect to provide similar coverage for himself by obtaining a proper endorsement to his workmen's compensation policy.[6] This amendment should eliminate any confusion as to whether such an employer can provide himself with compensation coverage, and, if so, the procedure to be followed so that his compensation policy will cover him.

Sub Contractors

As originally written, the Act provided that "in the case of an employer who is a subcontractor, the contractor shall be liable for and shall secure the payment of such compensation to employees of the subcontractor unless the subcontractor has secured such payment."[7] It was not clear whether this liability of the contractor extended to a case in which the subcontractor had too few employees to come independently within the compulsory provisions of the Act, and, also, to a case in which the contractor himself did not have sufficient employees to come independently within the compulsory provisions of the Act, even though his subcontractor did. Therefore, in order to remove the confusion, this section was amended to provide that this liability of the contractor would be determined solely by the number of employees of the subcontractor.[8] This means, in effect, that a contractor is now liable only to the employees of those of his subcontractors who independently come within the compulsory provisions of the Act and who have not provided coverage thereunder; and the contractor is not liable to the employees of those of his subcontractors who have working for them fewer than the eight or more workmen or operatives necessary to bring them within the compulsory provisions of the Act.

Medical Benefits

Several amendments of varying importance were enacted concerning the medical benefits allowed under the Act.

The original law provided that the employer should furnish all medical, surgical, or other attendance or treatment and various other services and

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[5] *Ibid.*
[6] Miss. Laws 1948, c. 354, § 34, as amended; Miss. Code § 6998-04 (1942), as amended.
[7] Miss. Laws 1948, c. 354, § 4; Miss. Code § 6998-04 (1942).
[8] *Ibid.*, as amended.

apparatus, and, unless the employer failed to furnish such, the employee was not specifically authorized to provide his own medical treatment.[9] However, the Act, as amended, stipulates that the injured employee, ". . . in emergency cases . . ." may provide his own medical treatment.[10] This allows the injured employee to act in certain situations without the loss of time often involved in notifying and obtaining his employer's consent, or without the risk attached to obtaining medical treatment for an industrial injury from someone whom the employer had not authorized.

Of particular importance to all persons concerned with the handling of workmen's compensation matters is the provision concerning the payment of medical fees. The Act now specifically provides that ". . . no medical bill shall be paid to any doctor until all forms required by the Commission have been filed."[11] This means that no doctor has a right to expect any monetary return for services rendered by him in a workmen's compensation case until all interested parties, including the Commission, have received a full report concerning the case. In this connection, it is important to point out that the Act now makes it mandatory that "all findings pertaining to a medical examination, either at the instance of the employer, or by order of the Commission, shall be reported on Commission forms and copies made available to both the employer and employee."[12] All interested parties to a case are entitled to a full and complete report concerning both medical treatment and medical findings, whether the findings of the medical examination are favorable or unfavorable to any particular side. The purpose of workmen's compensation is to provide help to injured employees when they receive industrial injuries, and this help can be adequately provided only when the full extent of such injuries are known by all interested parties.

Finally, under the original law an injured employee who was not satisfied with the diagnosis of the employer's doctor could obtain medical assistance of his own choice, but the amount of the doctor bill which the employer was required to pay, if the employee's doctor upset previous medical findings and was proved correct in his diagnosis, was limited to $10.00.[13] It was thought that $10.00 was inadequate to enable an employee to obtain a thorough examination and diagnosis, so this limit was increased to $100.00.[14]

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[9]Miss. Laws 1948, c. 354, § 7(a); Miss. Code § 6998-08 (A) (1942).
[10]*Ibid.*, as amended.
[11]Miss. Laws 1948, c. 354, § 7(c), as amended; Miss. Code § 6998-08(c) (1942).
[12]Miss. Laws 1948, c. 354, § 7(f), as amended; Miss. Code § 6998-08(f) (1942).
[13]Miss. Laws 1948, c 354, § 7(e); Miss. Code § 6998-08(e) (1942).
[14]*Ibid.*, as amended.

Hernia Injuries

The hernia provisions of the original law were the subject of much controversy. They were so strict and positive in their requirements that an employee who attempted to work for even a reasonably short period after he felt a sharp pain in his stomach region ran the risk of losing his rights under the Act, even though, in fact, he did suffer an industrial hernia.[15] Now,

"in all cases of a claim for hernia, it shall be shown by a preponderance of the evidence:

1. That the descent or protrusion of the hernia or rupture immediately followed as the result of sudden effort, severe strain, or the application of force to the abdominal wall;

2. That there was severe pain in the region of the hernia or rupture;

3. That there has been no descent or protrusion of the hernia or rupture prior to the accident for which compensation is claimed;

4. That the physical distress resulting from the descent or protrusion of the hernia or rupture was noticed immediately by claimant, and communicated to his employer within a reasonable time;

5. That the physical distress following the descent or protrusion of the hernia or rupture was such as to require the attendance of a licensed physician or surgeon within five (5) days after the injury for which compensation is claimed. Post-operative hernias shall be considered as original hernias."[16]

A comparison between the present provisions and those of the original law will show that the time within which the injured employee is required to notify his employer of the injury has been increased from forty-eight hours to ". . . within a reasonable time"; and the time within which an injured employee must obtain the attendance of a physician has been increased from forty-eight hours to five days. Moreover, the original law provided compensation only upon the "descent" of a hernia. The word "protrusion" is added to take care of hernias which do not descend through the inguinal ring. The word "rupture," which has also been added, is a term more generally understood than is "hernia," and it should help the employee to better understand what this section of the Act covers. Also, this section formerly provided that pain must be suffered in the "hernial region," but this wording has been changed to

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[15]Miss. Laws 1948, c. 354, § 8(f); Miss. Code § 6998-12 (1942).
[16]*Ibid.*, as amended.

"region of the hernia," so that it may include hernias or ruptures in other portions of the abdominal region not technically classified as the hernial region. A post-operative hernia is specifically made compensable under this section, and it is no longer required that such prostration result as to compel the injured employee to cease work immediately.

These amendments seem not only to have clarified the hernia provisions, but also to have eliminated many technicalities.

Death Benefits

Many questions presented themselves under the Act as originally written in connection with claims arising from industrial deaths. Some of these questions could be handled easily, while others presented problems of great difficulty. Therefore, it became readily apparent that certain provisions of the Act dealing with death benefits would have to be amended.

A problem that soon presented itself concerned the liability of an employer for funeral expenses under the Act when the deceased had a burial insurance policy that covered such expenses. If some other burial benefit paid the funeral expenses, did liability for such expenses under the Act cease? If so, was it just that anyone be allowed to profit because a deceased employee had had the foresight to provide himself with burial insurance? This constantly recurring question proved itself so troublesome that it finally was determined that an amendment to that portion of the Act providing liability for funeral expenses was the only solution. Now, if an industrial injury causes death, in addition to other benefits, the employer is liable for "reasonable funeral expenses not exceeding three hundred fifty dollars ($350.00), *exclusive of other burial insurance or benefits.*"[17] This means that the employer is liable not to exceed $350.00 for the funeral expenses of one of his employees who dies is a result of an industrial injury, even though some other form of burial benefit actually pays the funeral bills. For example, if a deceased employee had a funeral bill in the amount of $200.00, and this bill was paid through a family burial insurance policy, the employer would still be liable in the amount of $200.00 for funeral expenses. However, instead of paying this amount to the funeral parlor, it would be paid to the estate of the deceased, or to the dependents of the deceased.

As has been observed in an issue of the *Mississippi Law Journal*,[18] the Mississippi Workmen's Compensation Act, as originally written, did not specifically provide for partial dependency, and thus overlooked many

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[17]Miss. Laws 1948, c. 354, § 9(b), as amended; Miss. Code § 6998-13(b) (1942) as amended. Italics mine.

[18]20 Miss. L.J. 223 (1948).

deserving claimants. The awards had to provide either full compensation for dependency or no compensation at all. The amendment now makes it possible for the Commission to determine whether a dependency is total or partial and make an award in line with the facts presented.[19] As an example of what this amendment accomplishes, many parents who were only partially dependent upon the deceased will now be able to receive some continued help through compensation, whereas formerly they might have been excluded.

Another problem which has been clarified is that dealing with the payment of death benefits to dependent minors. It was originally provided that compensation might be paid directly to a minor dependent in the event the Commission did not require the appointment of a guardian.[20] This caused considerable confusion, particularly with respect to the legality of a payment directly to a minor of tender years. Therefore, this section was amended to provide that payment of compensation due a minor dependent shall be made to his or her natural guardian unless the appointment of a legal guardian is required by the Commission.[21] This should make it possible for claims which involve minor dependents to be handled with less confusion than heretofore.

A constantly recurring question presented to the Commission for determination is that concerning who is the "widow" of a deceased within the meaning of the dependency provisions of the workmen's compensation law; and it is no easy task to arrive at a just and proper decision in some cases. Often a woman who had stood in the relationship of a wife and had lived with the deceased for years was denied compensation, because investigation disclosed the existence of another woman with whom the deceased had legally married, but had never divorced. The term "widow" was amended to include, not only a decedent's legal wife, but also, under certain conditions, a woman who had entered into a ceremonial marriage with the deceased at least one year prior to his death and who stood in the relationship of a wife to the decedent on the date of his death. Further, a legal wife who has separated from her husband prior to his death is prevented from claiming compensation as his dependent widow unless, within three years prior to his death, she has affirmatively asserted her marital rights by properly calling upon him for support. Also, no one who has entered into a ceremonial marriage or lived in open adultery with another since his or her separation from the deceased is a "widow" or

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[19]Miss. Laws 1948, c. 354, § 9(g), as amended; Miss. Code § 6998-13(g) (1942).
[20]Miss. Laws 1948, c. 354, § 9(c); Miss. Code § 6998-13(c) (1942).
[21]*Ibid.*, as amended.

"widower" as now contemplated in the Act.[22] These amendments should make it possible for just decisions to be made in all such cases.

The above are the more important amendments concerning death benefits. However, in addition to these, there were several of relatively minor importance. It is now expressly provided that a widow or widower suffering a mental or physical handicap, and children under the age of eighteen years, are presumed to be dependents as contemplated in the Act.[23] This means total dependency. Also, the original law provided that, in the event there was no surviving wife or dependent husband, the children's compensation would be increased from ten per cent to fifteen per cent of the average weekly wages of the deceased, while the parent or grandparent became entitled to twenty-five per cent. These figures have been changed, giving the children an increase from ten per cent to twenty-five per cent,[24] and providing the parent or grandparent of the deceased with a right to only fifteen per cent.[25]

Hearings

Concerning hearings conducted by the Commission for the purpose of determining controversies arising under the Act, there were some amendments made solely for the purpose of clarification.

As originally written, the Act provided that informal conferences and hearings in contested cases could be conducted by either a commissioner or a duly designated representative of the Commission.[26] The word "commissioner" was eliminated and, as amended, the Act provides merely that such hearings shall be conducted by a ". . . duly designated representative . . ." of the Commission.[27]

Under the original Act, there was some question as to whether it was the duty of the Commission to transmit the transcript in cases on appeal to the county in which the injury occurred, or to whatever county the party making the appeal may have requested.[28] In one case before the Commission, the party making the appeal requested that the transcript be sent to the circuit court of the county in which the initial hearing had been held, rather than the circuit court of the county where the injury had occurred. This was done; and, after the proper time had elapsed for an

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[22]Miss. Laws 1948, c. 354, § 2(14), as amended; Miss. Code §6998-02(14) (1942), as amended.

[23]Miss. Laws 1948, c. 354, c. 354, § 2(18), as amended; Miss. Code § 6998-02(18) (1942), as amended.

[24]Miss. Laws 1948, c. 354, § 9(d), as amended; Miss. Code § 6998-13(d) (1942), as amended.

[25]Miss. Laws 1948, c. 354, § 9(e), as amended; Miss. Code § 6998-13(e) (1942), as amended.

[26]Miss. Laws 1948, c. 354, § 18; Miss. Code § 6998-24 (1942).

[27]*Ibid.*, as amended.

[28]Miss. Laws 1948, c 354, § 20; Miss. Code § 6998-26 (1942).

appeal to be made, the opposing side argued that the appeal had been made to the wrong court in that it should have been made to the circuit court of the county in which the injury occurred and that, since the appellant had not appealed to the proper circuit court within the time allowed by statute, he had lost his right to appeal. As amended, this question is clarified, and it is now mandatory that an appeal from a decision of the full Commission on review be made to the circuit court of the county in which the injury occurred, regardless of where the initial hearing was held. Moreover, now "no controversy shall be heard by the Commission or an award of compensation made therein while the same matter is pending either before a Federal Court or any court in (Mississippi)."[29]

Another minor change of administrative importance is that allowing the Commission to use recording machines at investigations and hearings and later to transcribe the testimony therefrom.[30] Without the use of such machines, the investigations and hearings were geared down to the availability of regular court stenographers. This was not only expensive, but it put the Commission in the position of competing with the courts for trained personnel. With this amendment, not only is a form of competition eliminated, but a means is provided to greatly expedite hearings, and at a greatly reduced cost, through the use of Commission-employed stenographers and recording machines.

Attorneys

That portion of the Act which concerns itself with fees for legal services had two rather important additions. The Act still provides that legal fees must be approved by the Mississippi Workmen's Compensation Commission, after which they become a lien upon any compensation due the claimant;[31] also, one is guilty of a misdemeanor and subject to a penalty not to exceed $1,000.00 or one year in jail if he is convicted of accepting unauthorized fees or soliciting cases for either himself or someone else.[32]

Now, however, practice before the Mississippi Workmen's Compensation Commission is declared to be the practice of law and subject to the same limitations regarding legal representation as apply in any other court in Mississippi. This means that any person can represent himself before the Commission, but, if he is represented by anyone other than himself, he

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[29]Miss. Laws 1948, c 354, § 20, as amended; Miss. Code § 6998-26 (1942), as amended.

[30]Miss. Laws 1948, c. 354, § 22(b), as amended; Miss. Code § 6998-28(b) (1942), as amended.

[31]Miss. Laws 1948, c. 354, § 26(a); Miss. Code § 6998-32(a).

[32]Miss. Laws 1948, c. 354, § 26(b). Miss. Code § 6998-32(b) (1942).

must be represented by a licensed Mississippi attorney. For an appearance before the Commission, an attorney cannot receive a fee in excess of twenty-five per cent of the amount recovered before the Commission. It is likewise provided that any services rendered by an attorney where no controversy is filed shall be considered in the nature of consultation, and the attorney shall be entitled to an adequate fee.[33] In this connection, the Commission, by rule, has declared that a fee of not more than $25.00, or an aggregate of $25.00 in any one case, shall be considered a consultation fee and need not be submitted to the Commission for formal approval.[34] Where attorneys' fees must be formally approved, it is declared to be in the best interest of all concerned for the Commission to approve, within the limitations of the Act, contracts for employment voluntarily entered into between attorney and client, and the approved attorney's fee shall be paid in a lump sum with such discount as is provided by the Act being shared equally by attorney and client. However, the limitation of twenty-five per cent applies only to an appearance before the Commission, and is not to be construed as applying to a fee awarded for additional services before a superior court.[35]

Administration of Act

Many changes of varying importance were made concerning the general administration of the Act.

Section 13(c) was amended to provide that, until the Commission has passed on the necessity of such treatment and the reasonablentss of the claimant's refusal to submit thereto, no suspension of compensation shall be made by an employer because an injured employee refuses to submit to medical or surgical treatment.[36] This means that while an employer still has the right to suspend compensation during such time as an injured employee unreasonably refuses to submit to medical or surgical treatment, he alone does not have the right to determine when a refusal is unreasonable.

Section 28(a) of the Act was amended so as to remove the necessity of filing reports within ten days on injuries which did not result in a loss of time beyond the day or working shift on which the injury occurred.[37]

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[33]Miss. Laws 1948, c. 354, § 26, as amended; Miss. Code § 6998-32 (1942), as amended.

[34]Rules and Regulations of the Mississippi Workmen's Compensation Commission, Procedural Rule 10.

[35]Miss. Laws 1948, c. 354, § 26, as amended; Miss. Code § 6998-32 (1942), as amended.

[36]Miss. Laws 1948, c. 354, § 13(c), as amended; Miss. Code § 6998-19(c) (1942), as amended.

[37]Miss. Laws 1948, c. 354, § 28(a), as amended; Miss. Code § 6998-34(a) (1942), as amended.

This eliminates considerable paper work and expense on the part of all parties concerned and does not prejudice the rights of anyone.

The qualifications of the Commissioners have been changed to this extent: Under the original law, the requirements were that no more than one commissioner might be a representative of employees, and no more than one might be a representative of employers.[38] The requirements are now changed so as to provide that one member shall be a representative of employees, one member shall be a representative of employers, and one member shall be an attorney, with a least five years active practice in Mississippi prior to his appointment. The term of office of the chairman of the Commission is clarified insofar as it is now provided that his appointment as chairman shall run concurrently with his appointment as commissioner.[39]

The salaries of the commissioners, the secretary of the Commission, and the attorney-referees are now fixed by statute.[40]

The duties of the chairman of the Commission are now defined. He is declared the administrative head of the Commission, with final authority in all matters relating to assignment of cases for hearing and trial and the administrative work of the Commission and its employees.[41] He is also required to approve all travel expense[42] and all expenditures for the administration of the Act.[43] In other matters, the chairman has no greater authority than do the other two commissioners.

A particularly wise amendment was the one which provided that two commissioners could transact the business of the Commission during the absence or illness of one.[44] It prevents an unexpected situation of prolonged duration from seriously affecting the ability of the Commission to properly administer the Act.

The number of attorney-referees which the Commission can appoint was restricted to not more than two; and it was provided that the secretary of the Commission and the attorney-referees must be appointed by the Commission with the consent of the Governor. All employees of the

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[38]Miss. Laws 1948, c. 354, § (37(a); Miss. Code § 6998-43(a) (1942).

[39]*Ibid.*, as amended.

[40]Miss. Laws 1948, c. 354, § 37(b), as amended; Miss. Code § 6998-43(b) (1942), as amended.

[41]Miss. Laws 1948, c. 354, § 37(a), as amended; Miss. Code § 6998-46(a) (1942), as amended.

[42]Miss. Laws 1948, c. 354, § 40, as amended; Miss. Code § 6998-46 (1942), as amended.

[43]Miss. Laws 1948, c. 354, § 42, as amended; Miss. Code § 6998-48 (1942), as amended.

[44]Miss. Laws 1948, c. 354, § 37(c), as amended; Miss. Code § 6998-43(c) (1942), as amended.

Commission, with the exception of the medical consultant, are required to devote their entire time to their official duties.[45] Commissioners, the secretary of the Commission, and the attorney-referees are not to be construed as coming under the merit system as do other employees of the Commission.[46]

Section 46 of the Act, which concerns the Commission's annual report to the Governor, had the word "calendar" inserted in the first line immediately preceding the word "year."[47]

Finally, there has been entirely eliminated Section 44(5) of the original Act, which provided that insurance carriers might deduct from their premium tax assessments for the operating expense of the Commission;[48] and Section 44(6) of the original Act has been re-designated as Section 44(5) of the Act as amended.[49] All of the expenses for the operation of the Mississippi Workmen's Compensation Commission are now borne by the insurance carriers writing workmen's compensation insurance in Mississippi and by the self-insurers, and no portion of such expense is borne by the State.

Miscellaneous Amendments

There were several amendments to the Act which could not be grouped under any of the previous headings, and discussion of them has been saved until last.

The minimum weekly compensation payable to injured employees in cases arising under the provisions of the Act has been raised from $7.00 to $10.00, except in partial dependency cases.[50] This is of no particular importance at the present time, however, as present wages are great enough to bring almost all claimants above the minimum level. For example, under the law as amended, anyone whose average weekly wage is more than $15.00 will get more than the minimum weekly compensation allowed.

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[45]Miss. Laws 1948, c. 354, § 41, as amended; Miss. Code § 6998-47 (1942), as amended.

[46]Miss. Laws 1948, c. 354, § 37(b), as amended; Miss. Code § 6998-43(b) (1942), as amended.

[47]Miss. Laws 1948, c. 354, § 46, as amended; Miss. Code § 6998-52 (1942), as amended.

[48]Miss. Laws 1948, c. 354, § 44(5); Miss. Code § 6998-50 (1942). That section of the Act read as follows: "Any amount so assessed against and paid by an insurance carrier shall be allowed as a deduction against the amount of any other tax levied by the state upon the premiums, assessments or deposits for workmen's compensation insurance on contracts or policies of said insurance carrier."

[49]Miss Laws 1948, c. 354, § 44, as amended; Miss. Code § 6998-50 (1942), as amended.

[50]Miss. Laws 1948, c. 354, § 6(b), as amended; Miss. Code § 6998-07 (1942), as amended.

The original law provided that no compensation shall be payable if the industrial injury was ". . . occasioned by the intoxication . . ." of the injured employee.[51] This has been changed to read ". . . intoxication of the employee was the proximate cause . . ."[52]

Regarding commutation and lump sum settlements, the Commission has been given final authority concerning such questions.[53] Moreover, the original law provided that, when a lump sum settlement was granted a surviving wife, the probability of her remarriage should be taken into account and determined in accordance with the remarriage tables of the Dutch Royal Insurance Institute.[54] The words ". . . or dependent female . . ." have been added so as to have these remarriage tables apply to any dependent female, as well as to a surviving wife.[55]

That portion of the Act concerning minors illegally employed was amended by the word "Mississippi" being inserted to identify the labor laws referred to in the original Act.[56] The Commission has further amplified this section in its rules and regulations.[57]

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[51]Miss. Laws 1948, c. 354, § 4; MISS. CODE § 6998-04 (1942).

[52]*Ibid.*, as amended.

[53]Miss. Laws 1948, c. 354, § 13(j), as amended; MISS. CODE § 6998-15 (1942), as amended.

[54]Miss. Laws 1948, c. 354, § 13(j); MISS. CODE § 6998-19(j) (1942).

[55]*Ibid.*, as amended.

[56]Miss. Laws 1948, c. 354, § 48, as amended; MISS. CODE § 6998-54 (1942), as amended.

[57]Rules and Regulations of the Mississippi Workmen's Compensation Commission, Procedural Rule 11 reads as follows: "VIOLATIONS OF CHILD LABOR LAW. In matters pertaining to violations of the Child Labor Law, those certain sections numbered 6985 to 6993, inclusive, of the 1942 Code of Mississippi Annotated, shall be considered by the Commission as the labor law referred to in Section 48 of the Mississippi Workmen's Compensation Act. The Commission may order double compensation assessed against any employer where a minor worker is injured in the occupations or businesses specifically listed as hazardous in said sections in the Mississippi Code of 1942 Annotated, heretofore referred to. In all other instances of injury to minors, before double compensation shall be assessed against an employer as a penalty, there shall be filed with the Secretary of the Commission a certified copy of the findings of the court of final appeal on the prosecution and conviction of the employer in connection with violation of the Child Labor Law."

MISSISSIPPI REPORTS AND REPORTERS

*V. A. Griffith**

The Reporter

Until after the time of the separation of the American colonies from the parent country it was not customary for the English judges to deliver written opinions, but the reason or reasons for their judgments were given orally from the bench, and were noted, along with the other proceedings in the several cases, by reporters in attendance, and by them subsequently published. At first the reporters were barristers, or others, holding no public appointment, who took notes for their own use and information or else in order to publish them as private enterprises. The earliest of these covering the period from 1292 to 1534 are embodied in the Year Books, and those of the later periods bear the name of the reporter.

When, after Independence, the states began the permanent establishment of their own courts, as was done for the federal judiciary by the Constitution of 1787, there were at first no official reports and the English custom of delivering opinions orally was followed. The earliest volume of American judicial decisions (Kirby's) was published in 1789 as a private venture. The custom in this country of delivering written opinions is said to have been introduced by Justice Kent of the Supreme Court of New York in 1798, and being followel in other jurisdictions, the states began in a few years to provide official reporters for their highest courts, and soon assumed in whole or in part the expense of publication.[1] The practice by which the earlier reports bore the name of the reporter, and not that of the court, prevailed in Missippi until 1851.

By an Act approved June 29, 1822,[2] it was enacted that—

> It shall be the duty of the supreme court to appoint from time to time, a suitable person to report all the decisions of that court, which may hereafter be had therein, and deemed useful and the reporter so appointed shall cause the said reports to be printed and published, being first approved by a majority of the judges of said court * *.

The first reporter appointed was R. J. Walker of Natchez, but no record has been found of the date of the appointment, although it must

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*Reporter, Supreme Court of Mississippi.
[1]Baldwin, The American Judiciary 261.
[2]Poindexter's Code, c. 15, § 37 (1822).

have been far after 1822, for the date of his birth was 1801. He says in his preface to his volume of reports that it

> contains the decisions of the Supreme Court from the organization of the State government (1817) to the period of the adoption of the New Constitution (1832). During much the larger portion of that time the present reporter was not in office; and in very few instances, were statements of the cases and the briefs of counsel preserved. In such cases nothing more could be given than the opinions of the court to which notes have been occasionally added by the reporter.

Although the quoted text of the Act required the reporter to report all the decisions of that court which may *hereafter* be made therein, the first volume of Walker goes back, as stated, to the June Term, 1818, and down to and including the December Term, 1832. For the June and December 1818 Terms only two opinions bear the name of the writers, all of the remainder having apparently been taken from the files without identification of the author. It seems that no terms were held in 1819, but beginning with the 1820 terms the opinions were headed each by the name of the judge who wrote it, there being only a few exceptions.

The period of fourteen years covered by Walker's reports shows the number of cases reported at an average of less than twenty a year. It is evident therefore that most of the cases were decided by oral opinions from the bench, and that if these were to be reported it would have been necessary for the reporter to be in attendance and take notes as was done by the English reporters. It is apparent that Mr. Walker did not consider himself obliged to so attend and report, and nothing more would be thought of that feature except for an expression in the preface in the first volume of the reports of his successor, Howard, in 1839, wherein he says: "I must also request the profession to bear in mind that I was not appointed Reporter until the close of the last term of Court, and have not, therefore had the advantage of taking notes at the hearing of the case, but have been obliged to report entirely from the record." But if Mr. Howard at first considered that it was his duty to attend and take notes at the hearing, he must have abandoned that thought, for his subsequent volumes bear no evidence that any part of his reports was the product of having taken notes at the hearing, nor do any of the volumes of any of his successors bear any such evidence. We may say, therefore, that the previous English method of reporting was never followed in this state, that the occasional later case in which counsel, naming him, is reported to have made an oral argument, followed by a report of that argument, was made through a request by the reporter to counsel to write out his argument for publication as a part of the case. In Volume 2 of

Howard's Reports, 1839, the format was set which in the main was followed by all the reporters down to the Reporters Act of 1948.[3]

There is no biography of R. J. Walker, but his career ranked so high in national and international importance that a sketch of him is found in Volume 23 of the Encyclopaedia Britannica. In that sketch he is correctly given as a native of Pennsylvania, and it is said that he graduated with honors at the University of Pennsylvania, but the date of his graduation given there as 1829 is manifestly erroneous, because in the report of *Lombard v. Lewis,*[4] R. J. Walker is reported to have been counsel for the defendant at the June Term 1826. On the first Monday of January, 1833, he delivered at Natchez what is termed a Union speech of such power and effect as to attract national attention including that of President Jackson, and the support of the latter led to Walker's election to the U. S. Senate against Poindexter in 1836, and he was reelected in 1842. He resigned in 1845 to accept the post of Secretary of the Treasury. As Secretary of the Treasury he prepared reports which are said to have been among the ablest of all American state papers. At the close of that administration Walker became an agent in England for the Illinois Central Railroad Company. In 1857 he was appointed by President Buchanan territorial governor of Kansas, but resigned in disapproval of the Lecompton Constitution. He earnestly differed with the people of his adopted state over the slavery question and upon the repudiation issue, and it is believed that he never returned to Mississippi, even for a visit, after his resignation from the Senate. While opposed to slavery he advocated a gradual emancipation and freed his own slaves in 1838. His opposition to repudiation led to his appointment during the Civil War as the agent of the Secretary of the Treasury of the United States in Great Britain and Germany where, on account of the repudiation record of some of the Southern states, he was successful in preventing loans to the Confederacy, and succeeded in borrowing large sums for the United States. After the war in 1867-68 he assisted with great profit to himself, it is said, in the Russian sale of Alaska. His death occurred in 1869.

Volney E. Howard succeeded Walker as reporter, and his reports in seven volumes extend from the January Term, 1834, to the January Term, 1843. Howard was a person of strong and versatile character. In his migrations from Maine to California he was seldom at any place long enough to become an elector until he was appointed or elected to some high position or office. Born and educated in Maine, he came to Brandon in 1832, studied law and began practice there. He moved to Scott County and in 1836 was elected to the Legislature from that county. After the

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[3]Miss. Laws 1948, c. 416.
[4]1 Miss. (1 Walker) 229 (1834).

adjournment of that body in 1837 he remained in Jackson and was appointed reporter in 1838, in tht place of a previous appointee who had failed to serve. For some time he edited *The Mississippian,* an important Democratic organ of that period. He was strongly opposed to repudiation, a burning issue of the day, and over it he spent some of his spare time in fighting duels, one of which was with McNutt, the repudiationist ex-governor. He sought vindication of his views in a candidacy for Congress but was defeated, and along with many other prominent men who left the state during that period, among whom was Prentiss, he moved to New Orleans in 1843 and to San Antonio, Texas, in 1844, where he was elected to the Texas constitutional convention of 1845, and later to the Texas Senate. In 1846 he was appointed Attorney General of Texas but declined it, preferring his seat in the state senate. Three years later he was elected to Congress, 1849-1853. In the latter year he accepted appointment as the legal agent of the United States Land Commission in California and moved to San Francisco. In May 1856 he was appointed major-general of militia with instructions to put down the Vigilantes, an extra-legal organization. After the disbandment of that organization, Howard moved to Sacramento in 1858, and to Los Angeles in 1861, where he became district attorney, 1861 to 1870, and judge of the superior court, 1880 to 1884. He took strong positions on important issues in the California constitutional convention of 1878-1879. He died at Santa Monica on May 14, 1889 at the age of eighty.

Smedes and Marshall of Vicksburg succeeded Howard, and their reports in thirteen volumes extend from the July Term, 1843, to the January Term, 1851. This firm, formed in 1837, was composed of William C. Smedes and Thomas A. Marshall. Smedes was born in New York City of a family highly connected in that State. He came to Vicksburg about 1835 and soon rose to distinguished membership in that distinguished bar. He was associated at times with Judge Guion and S. S. Prentiss. Belmont, the home of the Smedes family in Vicksburg, was originally that of Prentiss and was one of the city's most beautiful mansions. Mrs. Smedes was Anna Marshall, daughter of the Chief Justice of Kentucky, who himself was the nephew of Chief Justice John Marshall.

Having been general attorney for the railroad which under great difficulties was being built from Vicksburg to the east and becoming greatly interested in it, Mr. Smedes was elected president of that company and visited Europe to float bonds for it, and finally under his presidency the road was finished into Meridian. Thus Smedes, although eminent at the bar, did perhaps his greatest work for the State as a business man. His death occurred soon after, on February 22, 1863.

Thomas A. Marshall was a Kentuckian, born at Augusta, Kentucky, March 29, 1812; he graduated from Augusta College in 1830, and was admitted to the Kentucky bar in 1835. He came to Vicksburg in 1836 and entered the law office of Harrison and Holt, and in 1837 formed a partnership with W. C. Smedes, then a noted attorney of the state, as already mentioned. He was elected to the Legislature on the Union ticket in 1851 and was a delegate to the Secession Convention of 1861, where he was one of the thirteen who voted against the secession ordinance. He was, therefore, one of the few important men of the times in our State who had the foresight to apprehend that, owing to material, physical and geographical handicaps, the secession movement could not ultimately win, however much the merits of the issues may have favored the movement. Upon the close of the war he was a delegate to the Convention of 1865, and thereafter he resumed practice until 1873 when failing health caused his retirement.

In 1851 Smedes and Marshall were succeeded by J. F. Cushman, whose reports, Volumes 23 to 29, covered the January Term, 1851 to the April Term, 1855.

Cushman was a native of Massachusetts; he came to Lafayette County in the late thirties, and was a representative in the Legislature from that county from 1842 to 1850. In 1858, after the expiration of his term as reporter, he was elected circuit judge of the seventh district, and while in that office, was appointed minister to Argentina. Returning to Oxford at the outbreak of the Civil War, he died there in 1862. In a preface to the last volume of his reports, Volume 29, he made a bitter comment on the criticisms which he had encountered during his term as reporter.

In 1856 Cushman was succeeded by James Z. George, and his reports in ten volumes extended from the December Term, 1855, to the April Term 1863. General George was born in Monroe County, Georgia, October 29, 1826; he moved with his mother when eight years of age, first to Noxabee County, and soon thereafter to Carroll County. His only scholastic education was what he obtained in the old field schools. At twenty he joined the Mississippi Rifles, commanded by Col. Jefferson Davis in the war with Mexico, but was discharged on account of his health. Returning to Carroll County he studied law; he was admitted to the bar in 1847 and began practice at Carrollton. At the time of his election as reporter he had already gained reputation as one of the State's ablest lawyers. He was a member of the Secession Convention in 1861 and voted for the ordinance. He joined the Confederate forces and was a Captain in the Twentieth Regiment Mississippi Cavalry and later brigadier general of State troops. He resided in Jackson as a member of the eminent law firm of Harris and George from 1872 until appointed a member of the

Supreme Court of Mississippi in 1878, Chief Justice in 1880. Elected to the U. S. Senate in 1880, he served therein from March 4, 1881, until his death at Mississippi City, where he had gone in search of health, on August 14, 1897. He was chairman of the State Democratic Executive Committee in 1875 and was prominent in the overthrow of the carpet-baggers in the election of that year. George was a member of the Constitutional Convention of 1890 and took a prominent part, especially as to the franchise clause, which he successfully defended thereafter in every forum.

Upon the reconvening of the Court after the close of the War, Reuben O. Reynolds, of Aberdeen, was elected reporter and his reports, Volumes 40 to 42, cover the period from the October Term, 1864 to the October Term, 1869. Col. Reynolds was born in the town of Madison, Morgan County, Georgia. In early childhood he was brought by his father, a physician, with the family, to Monroe County in this State. Young Reynolds graduated at the University of Georgia with the degree of Bachelor of Arts and proceeding thence to the University of Virginia, graduating there with the degree of Bachelor of Laws in 1855. In the following year he began the practice of law in Aberdeen and in 1858 entered into partnership with Lock E. Houston, a mature and prominent lawyer of that city, a partnership which was unbroken for thirty years. He went into the Confederate Service immediately on the outbreak of the Civil War and rose to the rank of lieutenant-colonel. Returning to Aberdeen at the close of the War, he was elected reporter, as stated.

In 1875 he was elected to the State Senate, and he continued a member of the body until his death, which occurred on September 4, 1887. A full account of his career as a lawyer and citizen is contained in the resolutions of the Bar, presented before the Supreme Court at a memorial session, and is published in Volume 66 of the Missippi Reports at pages 692-697.

By the beginning of the year 1870 the carpet-baggers were in full control under the Constitution of 1869, and Joshua A. Morris was installed at Attorney General. The order was that the Attorney General act as reporter, as was then the rule, and still is, in Tennessee. His reports are Volumes 43 to 48 and embrace the May Term 1870 to the April Term 1873. Morris was not a carpetbagger, but was a native of Tennessee and had lived in Mississippi for some years theretofore, his principal occupation being that of a newspaper editor. He had been editor of the Oxford Eagle and later of the Port Gibson Reveille. At the time of election as Attorney General, he was residing at Fayette. That he was also a lawyer of more than ordinary ability may be seen from his reports and from some of his reported briefs. He was popular

and entertaining, being noted for his wit and humor. It is supposed that he owed his place to the suggestion of the federal judge, R. A. Hill, a native of Tennessee, who was influential with the dominant party at that time. Upon the expiration of his term, General Morris moved to Vicksburg and later to Natchez where he died about 1890. In Natchez he was the attorney on a contingent fee for the families of a number of employees killed in an explosion, from which he made fees large enough for a competence for the remainder of his life.

Morris was succeeded by George E. Harris who brought to his assistance Graham H. Simrall, and their reports are Volumes 49 to 52, covering the October Term, 1873, to the October Term, 1876. Harris was a native of North Carolina, born on January 6, 1827, in Orange County; he moved to Tennessee, and then to Mississippi; he attended the common schools, studied law, and was admitted to the bar in 1854; he entered the Confederate army and served until the close of the war; he was elected district attorney in 1865, reelected in 1866, elected as a Republican to the Forty-first and Forty-second Congresses (1869-1873), and elected attorney general for the term 1874-1878. He died in Washington, D. C., April 30, 1911.

Simrall, who assisted Harris and who is believed to have done, in fact, most of the work as reporter, was the son of Chief Justice H. F. Simrall of the Mississippi Supreme Court and was a practicing lawyer in Vicksburg in association with Major L. W. Magruder. Later he removed to the southern part of the county (Warren) as manager of his father's property. Descendants of the Simrall family still reside there.

Harris and Simrall were succeeded by Brown and Hemingway, who alternated after their first volume, Volume 53, Volume 54 being by Brown, the next, Volume 55, by Hemingway, and so on through Volume 65 covering the October Term, 1876, to the October Term, 1888. The law firm of Brown and Hemingway was formed in Jackson in or about 1875. J. A. Brown, a native of Copiah County, was the only son of Governor Albert G. Brown, and J. B. H. Hemingway, a native of Carroll County, was the son of William Hemingway, who had served in the Legislature from that county and was a member of the Constitutional Convention of 1865. The young men attended law school at the University of Mississippi at the same time in 1871 and became life-long friends. Their law teacher had been L. Q. C. Lamar, who was so deeply impressed by their good conduct, studiousness and promise that he took a special interest in commending them. Joe Brown was "best man" when Hobby Hemingway married Emma George, daughter of General J. Z. George, in 1872.

Hemingway was in such poor health, at or towards the end of their term as reporters, that he decided to go West. He lived on a ranch in

Texas for a few years, after which he became a citizen of and a practicing attorney in New Mexico and was appointed U. S. Attorney for New Mexico in 1893, but died in 1896 before the expiration of his term. Brown continued in the practice of law in Jackson until the early nineties, when he removed to Seattle, Washington, where he resided until his death.

In 1888 Charlton H. Alexander was appointed reporter; he associated in this position his law partner, L. (Lex) Brame, and their reports from Volumes 66 to 72 cover the October Term, 1888, to the March Term, 1895. Judge Brame was a native of Clay County and practiced law at West Point. He served as chancellor from 1876 to 1880, and thereafter moving to Jackson, he practiced there until the time of his death.

C. H. Alexander was born at Kosciusko, November 12, 1858. He graduated in both the literary and the law departments at the University, 1877, 1879, and received the degree of LL.D. in 1901, on the occasion when he delivered the address "The Majesty of the Law," which is included in the volume "Oratory of the South." He began the practice of law at Starkville with Henry L. Muldrow and Wiley H. Nash under the firm name of Muldrow, Nash & Alexander, which continued until he came to Jackson in 1888 upon his appointment as reporter. He never held any elective office, but was deeply interested in all upward movements. His portrait is among those in the Hall of Fame, an honor which has not often come to a private citizen. He died suddenly in Jackson on May 15, 1912.

The work of Brame and Alexander as reporters was in all probability the most arduous that any reporter before or since has had to encounter. The docket had become heavy and many if not most of the opinions were short, giving no statement of the facts, so that the reporter was obliged to read the record in all such cases.

Thos. A. McWillie succeeded Brame and Alexander, and his reports, Volumes 73 to 96, cover the October Term, 1895, to the March Term, 1910. Captain McWillie, as he was familiarly called, was born at Kirkwood Plantation in Madison County, July 18, 1849, the son of former Governor McWillie. In 1874 he graduated at the University and was admitted to the bar in the same year. In 1875 he formed a partnership with William L. Nugent, which continued until the latter's death twenty years thereafter. The firm was generally recognized as one of the first in the State. Captain McWillie was eminent as a lawyer, but was notable also for his literary culture and his remarkable memory. It was said that he could call the names of all the characters in the works of Dickens, Thackery, Scott and other noted authors. Upon Col. Nugent's death, R. H. Thomp-

son, a profound lawyer of the day, was invited to join the firm, and at the request of the Court, following the death of McWillie, March, 1911, he reported Volume 97 for the March and October Terms, 1910.

Robert Powell was appointed on October 9, 1911, to succeed McWillie, and his reports, Volumes 98 to 132, cover the March Term, 1911, to the March Term, 1923. Robert Powell was a native of Bertie County, North Carolina, born September 6, 1851. He graduated from the literary department of the University of Mississippi in 1870, and the Lebanon (Tennessee) Law School in 1871; he began practice that year in Canton. He was appointed circuit judge, seventh judicial district, in 1896, and served until 1903. He then moved to Jackson to practice law and later the firm became Powell, Harper and Jiggitts. Judge Powell's death occurred in Jackson on November 11, 1930.

John Morgan Stevens succeeded Powell on October 9, 1923, and his reports, Volumes 132 to 153, are from the March Term 1923 (in part) to the March Term 1929.

Judge Stevens, a native of Perry County, graduated from the literary department of the University of Mississippi in 1898, and read law under his brother, Judge W. F. Stevens, at Carrollton; he was admitted to the bar in 1899. He practiced at Lexington and Hattiesburg. He was appointed chancellor of the eighth district in 1912, and to the Supreme Court of Mississippi in 1915. He resigned from the Supreme Court bench in 1920 to return to the practice of law, in which he is still prominently engaged in Jackson.

Louis M. Jiggitts succeeded Judge Stevens as reporter on October 9, 1929, and his reports, Volumes 154 to 190, cover the March Term 1929 (in part) to the March Term, 1941.

Col. Jiggitts, a grandson of Robert Powell, was a native of Canton, born on August 25, 1899; he attended the University of Mississippi, 1917-1920, and from there was sent as a Rhodes Scholar to Oxford, England, where he was graduated with a B. A. in Jurisprudence in 1923. Returning to the University, he was graduated in law in 1924. He began the practice of law in Jackson that year; later he was a member of the firm of Powell, Harper and Jiggitts. He served as a 2nd Lt. in the U. S. Army in World War I; he was a Captain of Co. C., 155th Infantry, Mississippi National Guard and was inducted into federal service November 25, 1940. He served in the South Pacific from February to December, 1944, attaining the rank of Lieutenant Colonel. Having contracted a fatal ailment common to that area, he was returned to the States where he died in Foster General Hospital in Jackson on March 22, 1945.

When Capt. Jiggitts (that being his rank at the time) was inducted into the federal armed service late in 1940, his term as reporter had not expired, and not knowing how long he would be detained, he desired to retain his civil office if it could be arranged. In this the Court desired to cooperate if possible, as was natural under the circumstances, and he was allowed to act for Volumes 189 and 190 through an assistant, Mr. W. C. Reed, Jr. The Court was confronted, however, by Sec. 267 of the Constitution of 1890 which prohibits the holding by any person of any office or employment under the laws of the State "without personally devoting his time to the performance of the duties thereof." It was finally decided to appoint some capable and competent person with the understanding that the office would be returned to Capt. Jiggitts if and when he returned from the war, and with that understanding Mr. Ernest L. Shelton was appointed. His reports, Volumes 191 to 203, cover the September Term, 1941, to the March Term, 1948.

On the effective date of the Reporter's Act[5] of 1948, March 31, 1949, and its advancement in policy, the present reporter was appointed, and his reports up to this time, Volumes 204 to 207, cover the September Term, 1948, to the September Term, 1949. Volume 208 for the September Term, 1949, and the March Term, 1950, will have been delivered before this article has been published.

The foregoing sketches, because of their brevity, do less than justice to the careers of many of those embraced therein and whose activities formed so large a part in the history of their day and time, but limitations of space prevent a more detailed treatment.

The Headnotes or Syllabi

Three principal problems confront the reporter: The syllabi, the briefs and the index. Section 9031 of the Code of 1942 requires the reporter to "prefix to each case a syllabus, which shall be confined, as near as may be, to the points of law decided by the court on the facts of the case without a recital therein of the facts." And the Reporter's Act[6] requires that the reporter "shall not use the syllabi or headnotes taken from some other legal publication or unofficial report," and that he shall submit "the syllabi or headnotes to each case as proposed by him to the judge of the supreme court who wrote the opinion in the particular case."

The first problem is to determine what is the point, or points, of law decided in the particular case. Many opinions embrace three elements or features: (1) The point or points decided; (2) judicial dictum; and (3)

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[5] *Ibid.*
[6] *Ibid.*

obiter dictum. A point of law decided is one which is essential to the ultimate conclusion, or is necessarily involved, in the judgment as entered, or as otherwise expressed, is the principle which actually dictated the final conclusion as carried into the judgment. An expression of opinion on a point involved in a case, argued by counsel and deliberately passed upon by the court, but not essential to the case, is judicial dictum; and while entitled to great respect, as having a persuasive force similar to that of a good text and to be followed unless found to be erroneous,[7] it is not binding as a precedent. Obitur dictum is an expression by the court or judge on a collateral question not directly involved, a mere argument or discussion or illustration used by the judge in the course of the opinion. The reason that judicial dictum is to be followed unless found to be erroneous is that it responds to the arguments made and presumably put before the judges in conference, whereby the minds of the judges were directed to it, so that therefore the response made in the opinion was the considered and deliberate conclusion of the entire court—in the absence of any qualification or dissent.

It is often difficult to distinguish between what is decision and what is judicial dictum. A careful comparative study of the treatment accorded by the ablest among our reporters of the past and up until about 1915 would seem to show that when it became a question of real doubt whether certain expressions in an opinion were decision or were judicial dicta, the election was to treat the matter as decision and to point it up in the headnotes. This perhaps is the best course to pursue; although when such matter is carried in the headnotes, it is copied into digests and accepted by text writers, thereby making what on a closer analysis is judicial dictum the equivalent of judicial decision, a matter to be regarded as the law of the land. In fact, many features of the firmly established, present-day common law have had their foundations in judicial dictum instead of judicial decision.[8]

It is often the case that the decisive point is stated by the court in its own language or by quotation taken from some standard text, and in sufficient brevity to be copied as a headnote. An interesting study is furnished by an examination of whether the reporters from Walker to McWillie copied such language as the headnote covering it or whether they composed the headnote or headnotes in their own language, either for brevity or for clarity. By common acquiescence George is regarded as the greatest among them, and he seldom copied the exact language of the court but composed his headnotes in his own words, and undoubtedly he

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[7]See concurring opinion in State v. McDonald, 164 Miss. 405 (1933), citing 15 C.J., Courts 953 (21 C.J.S., Courts 317).

[8]See Baldwin, *op. cit. supra* note 1, at 65.

did clarify and condense. Some of the others following the same course succeeded as well as he did or very nearly so.

Let it be conceded that the course pursued by the reporters during the first century of the State's existence was justified by all the pertinent conditions and that thereby they contributed in a distinct degree to the clarity and definiteness of our law as we have it today; yet the question now is shall the reporter prefer his own language and his own composition to that used in the opinion when of sufficient brevity to be used as a headnote. It is submitted that with the thousands of reported cases now at the hands of the judges and the hundreds of fine text books and encyclopaedias, the judge is able to select the precise language which the court wishes him to use, and that there is no longer any occasion for the reporter to substitute his individual version, leaving aside the obvious consideration that in the judges, and not in the reporter, lies the constitutional authority for the writing of the judicial law.

The preparation of the headnotes is the most exacting task with which the reporter must deal, and his work in that branch of his service reveals whether he knows what he is doing and whether he is willing to do it. And particularly is this the case in dealing with long and involved opinions. It is far easier to write long opinions than to condense them down to the precise point or points. To quote Baldwin in "The American Judiciary": "Some judges write treatises instead of decisions or in addition to decisions." Lack of time imposed by crowded dockets is an important, and sometimes a dominant, factor. As a rule members of the bar do not read these long opinions, but look merely at the headnotes, and when compelled to read them in some case for trial they struggle through to try to decipher what was actually decided, and they finally look again to the headnotes, and some complain that even these are sometimes too long. Thus the obligation on the headnote writer is to decipher and to decipher accurately out of all the words upon words used in the opinion, and at the last he may not be sure that his analysis has been accurate. Hence the value in the requirement of the Act of 1948 that the headnotes must before publication be submitted to the judge who wrote the opinion.

The work of the reporter in preparing the headnotes is a slow and tedious work. Not more than the headnotes for three cases can be prepared in an eight hour day, and the rate may be even less for the long opinions. Within a short time after the beginning of Powell's administration as reporter, the course was adopted of avoiding this labor by simply copying the headnotes to the Southern Reporter, and this practice was continued until the Legislature put a stop to it beginning with Volume 204, as has already been mentioned, and required in effect that the headnotes shall be prepared and supervised at home by those trained in our own

jurisprudence as had been done by McWillie and all his predecessors. It is proper to be said that the practice of copying the headnotes during the period above mentioned was approved and defended by the chief justice for years and until not long before the end of his long tenure. Its continuance was defended by others, and here on good ground, that the poor salary paid the reporter after 1916 was not sufficient to command a different course. In prescribing as it did by the Reporter's Act of 1948, the Legislature made a substantial increase in the reporter's compensation, but not enough to attract any eager line of applicants panting for the appointment.

A study of the headnotes or syllabi as prepared by the reporters during the first century of the State's existence will disclose that nearly all of them were masters in the law and of the language which accurately expresses it. The headnotes as prepared by George are generally considered as having a quality never surpassed in this or any other state. And we had great judges especially in the last quarter of that century. We can hardly escape the conclusion, however, in a close study of their work and of the syllabi which reflect it, that here and there a decision was rendered and an opinion written which would not have been rendered by our present court or its predecessors of the last few years; that there has been a perceptible growth in our law, like a natural stream which gains breadth and depth as it flows on towards the sea, but with this difference—the stream of the law will never reach the sea.

Statement of the Facts

The Code[9] requires that the reporter "shall carefully prepare and publish with each case a concise and correct synopsis of the facts necessary to a clear understanding of the decision." This is an old statute, and up until about forty years ago the report of many cases carried a statement of the facts by the reporter. About that time the docket of the Supreme Court became so heavy that it was next to impossible for the reporter to read the records and make up the statement of the facts, and to meet this situation the judges adopted the practice of stating "the facts necessary to a clear understanding of the decision" in the opinions themselves, and this is now the uniform rule of procedure. The reporter no longer prepares the statement of the facts. If he were required to do with the present deluge of cases he would have to have an assistant, perhaps as many as two.

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[9]Miss. Code § 9031 (1942).

Briefs

Code Section 9031, in dealing with the matter of briefs, provides that the reporter "shall state the names of counsel and concisely the material and controverted points made, and the authorities therein cited by them." The forerunner of this provision is found in Chapter 41 of the Laws of 1850, "that thereafter the Reporter shall not publish the briefs or argument of counsel, but may in his discretion report the points made by counsel concisely stated with a few of the leading authorities cited." In 1857 the statute was rewritten in terms similar to the present law, and has so remained since that time.

The period from the beginning of the financial crash in the latter part of 1838 down through and beyond the following decade was one of extreme political controversy in this State; the politicians fell out about almost everything and, strange as it may seem, the Mississippi reports and reporters did not escape. Smedes and Marshall were the reporters in office during eight years of this period. They had been appointed by the Supreme Court; a clamor arose to get them out of office, and, in order to do so, to make the reporter elective by the Legislature. The excuse for the clamor against the reporters, without foundation in fact, as we shall see, was that they published too much and too lengthily from the briefs and argument of counsel. The movement succeeded in the Act of 1850, by which the reporter was made elective by the Legislature (returned to appointive method in 1871), and a prohibition heretofore noted was inserted against the publication of briefs except under limited circumstances. The reporters declined to be candidates before the Legislature and Cushman was elected.

In their preface to the last volume of their reports,[10] Smedes and Marshall said

> Complaint has been made of the amount of superflous matter contained in these volumes. This we presume refers principally to the briefs of counsel. Without stopping to take issue upon the question whether these briefs (sometimes we admit too prolix and elaborate) are on the whole a legitimate ground of objection to the reports, nor more than to suggest the opposite proposition that they really enhance their value and add to their authority, we wish simply to remark that we have endeavored, from the first, to bring into prescribed and fixed limits the argument of counsel. * * * While we have abridged and expurgated much, and perhaps, might have beneficially carried our labors in that behalf further, yet, under our

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[10]22 Miss. (14 Smed. & M.) vii (1851).

> construction of the law, counsel had a right to give a "concise statement of the points submitted and the authorities cited" over which, when furnished to us, we did not conceive we had any power or control except to publish it as it was, or reject it altogether.

In his preface to his first volume,[11] Mr. Cushman, the legislative successor to Smedes and Marshall, says: "I know that the publication of the reports without the argument of counsel is so far out of the ordinary course of things in our State, that the gentlemen of the profession expect some apology for it." And he refers to the then recent Act of the Legislature that "hereafter the Reporter shall not publish the briefs or arguments of counsel, but may, in his discretion, publish the points made by counsel with a few leading authorities." He continues:

> In this volume I have endeavored to keep within the strict letter of the law. * * * To the gentlemen of the bar I would say, that it certainly cannot be expected that the reporter should be required, from long and labored briefs and arguments of counsel, to cull the main points with the leading authorities referred to, even if in all cases he should be able to do so. If, therefore, the members of the bar desire any portion of their briefs published, they must condense them so as to comply with the statute in this respect.

George, who succeeded Cushman, said nothing about briefs in his first volume, but the experience with that volume prompted him to publish as a preface to his second volume[12] what he termed a "Notice to the Bar," in similar terms.

Senator Reynolds said nothing about the matter, but his successor, Attorney General Morris, in the first volume of his reports, says in a preface[13] "that in condensing the arguments he has aimed at the observance of a liberal interpretation of the statute which limits him to 'a concise statement of the points made and authorities cited by counsel'. . ."[14]

When under the Reporter's Act of 1948 the administration of the office was brought more largely under the supervision of the Court than had theretofore been the case, all features of the work were taken up

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[11]23 Miss. (1852).
[12]31 Miss. iv (1858).
[13]43 Miss. ix (1871).
[14]Harris and Simrall, the successors to Morris, said of the matter in their first volume (49 Miss iii), "There is perhaps no duty more difficult and at the same time more delicate than that of condensing briefs of counsel so as to present merely the 'point made and the authorities cited.' There is a difference of opinion among the profession as to the space which should be allowed for the briefs of counsel. We have in many instances, following the example of our predecessors, given more space to briefs than contemplated by the Code; whilst in others, perhaps not enough appears."

with the judges, and thereafter the reporter said of the briefs in a preface to his first volume,[15] referring first to the provisions of the statute, that

> it is often of little service merely to state a point made by counsel without reporting enough from his brief to show what he made of his point or points. The quality of many briefs is such that it is to be regretted that they cannot be published and preserved in full. This is plainly far from possible since the reports are limited to three volumes a year. The judges of the Supreme Court have suggested, however, that wherever reasonably practical a more liberal treatment of the briefs shall be accorded than the literal terms of the statute could imply, and this policy has been pursued in the endeavor to select excerpts which will disclose not only the points made but will report something of how counsel has developed or reinforced his points * *.

The policy thus announced was pursued for two volumes, when it was found that to do so further would run the reports beyond three volumes a year and that it would be necessary to go back, although with reluctance, to a method of treatment more nearly expressed by the literal terms of the statute, but which when done would still leave space enough for a fuller or more liberal treatment in a few cases of great public importance or in new matters wherein the law is in the process of development, as, for example, in some of our mineral cases.

It is interesting to see by actual comparison whether the complaint against Smedes and Marshall had any justification or any other basis than politics, and whether Cushman, who started out with a bold declaration that he expected to keep within the letter of the law in the matter of briefs, actually did so as his experience progressed, and then compare these against four of their successors concededly among the ablest that we ever had. We may classify all these under three heads: (1) No briefs, including situations where no briefs at all were published or where so little of them was given as to amount to practically nothing; (2) short extracts, where extracts were published giving the substance but far less than a full publication, and (3) full treatment where so much of the brief was published as to amount to the body of it.

	No Briefs	Short Extracts	Full Treatment
12 Smedes and Marshall (1850)	104	121	6
6 Cushman (1855)	14	40	20

[15]204 Miss. vii (1949).

In this volume Cushman published 140 pages of the briefs in one case.

4	George (1857)	43	35	18
41	Miss., Reynolds (1868)	50	43	18
68	Miss., Brame and Alexander (1890)	15	122	14
96	Miss., McWillie (1911)	27	77	32
	Total	253	438	108

Thus it will be seen that Smedes and Marshall, who were voted out of office because they published too much of the briefs, actually published proportionately a greater number of cases with no briefs and fewer of full briefs, than any of their successors, and that Cushman, who was elected on the no brief platform, wound up by publishing proportionately a lesser number of cases with no briefs and a greater number of full briefs than any of his successors!

The foregoing experiences of nearly a century, during part of which time the question of briefs or no briefs was a live political issue, established two things, (1) that the reporters have considered with the approval of the Court that the statutory provision as to the publication of briefs is directory rather than strictly mandatory, and (2) that it is settled in our State that we intend in our reports to avail of the learning and labor of counsel as well as of the judges so far as practicably possible.

But in the matter of how many cases in each volume shall be published with no briefs, how many with short abstracts and how many with full treatment of briefs, we are today about where we were sixty to a hundred years ago. An examination of our last published volume, 207 Mississippi Reports, 1949, shows the following:

No briefs, 10; short abstracts, 68; full treatment, 7, which is about in the same relative proportion as is found in the work of Brame and Alexander, although they could report more cases per volume because in those days the opinions of the Court were much shorter than now.

But in recent years we have gained this advantage: About ten years ago the Clerk of the Supreme Court with the concurrence of the Court sent out to all the lawyers of the State a monograph, written by a member

of the Court, entitled "Suggestions for the Preparation of Briefs."[16] In this pamphlet it was suggested that the opening pages of the brief should contain a topical or subject index, in which there is a

> concisely stated summary of each of the law points which the brief maker will urge before the Court. Point I will be a concise statement, in one paragraph, if possible, of what that point is, and immediately following thereunder will be a list of every case or the citation of every text or statute which the brief maker is relying on to support that point. Point II briefly stated will follow, and all the cases, texts, or statutes relied on in support of that point will be indexed thereunder, and so on through all the points.

The value of this suggestion, if well or ably followed, is sufficiently attested by the fact that it is a mandatory feature in briefs in the United States Supreme Court, and in many if not most of the appellate courts of the country. But besides its value, it is a sign certain that the lawyer who prepared the brief knows his case, knows how to analyze it and knows what he is talking about. It is the hall-mark of the top-ranking lawyer, and although all of that station have not yet begun to use it in this State, there will be in the course of time a general recourse to it by all of that rank.[17] All such summaries will be published as a part of the case, and none omitted, thereby making them permanent testimonials of the industry, ability and high rank of the authors.

In concluding our observations about the publication of briefs and our experiences in this State, it is appropriate to undertake a more definite statement as to why the publication of the briefs to the extent required by statute is of the value which justifies it, a question which may be translated or pointed up into a very practical inquiry: Why is it that the judges of the Supreme Court in their daily work use only the official reports of cases so far as officially reported?

We have seen that judicial dictum is of such persuasive forces as to be followed unless found wrong and later it will be pointed out that judicial dictum constitutes a large part of the opinions in our reported cases. And we have seen that a part of its definition is that it is of matter *argued by counsel.* It is of real importance, therefore, to a judge or lawyer in examining an opinion, in order to appraise its weight and meaning on a particular point, that he may be able to look back to the published briefs

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[16]See Roberds, *Some Suggestions As To Oral Arguments and Written Briefs in the Supreme Court of Mississippi,* 17 Miss. L.J. 113 (1945).

[17]Fairly good examples are found in Ross v. Biggs, 206 Miss. 542 (1949); State v. Rogers, 206 Miss. 643 (1949); Goodwin v. Misticos, 207 Miss. 491 (1949); and see especially Perkins v. White, 208 Miss. 158 (1950).

to see whether counsel touched on that point in such a manner as to bring it to the attention of the Court as being within the scope of his argument. Moreover and equally important is, in a parallel case, the situation when the question is whether the case cited or to be cited is decisive of the case at bar or whether the legal parallel is less close, and on this an examination of the briefs is often determinative. One illustration is the frequency with which opposing counsel cite the same case in support of their opposing contentions. Hence Smedes and Marshall were correct when they tersely said a hundred years ago that the briefs really enhance the value of the reports and add to their authority.

Unfortunately, and whatever may be said, there are still some who in writing their briefs demand the privilege to roam the range without being fenced in by any orderly and analytical arrangement of precise points, apparently forgetting that the Court has work to do and no time to ride the range. Hard as it is for the Court to make much out of these, it is still more difficult for the reporter.

The Index

The statute in effect today,[18] which goes back to 1857, provides that each volume of the reports "shall contain * * a full and alphabetical index of the subject matters of the volume prepared by the reporter." There is here a significant change of language as compared with what is to be embraced in the syllabi. The statute requires the syllabi to be confined, as near as may be, to the points of law decided while the index runs fully to the subject matters of the volume. Manifestly, then, the index should cover all judicial dicta as well as all points decided. But from the beginning with Walker, the indexes consisted simply of carrying the headnotes back to the back of the volume and there arranging them alphabetically. Under that practice, unless the headnotes carried all the subject matters of the volume, there would be no index to all the subject matters. But concededly the syllabi did not endeavor to carry all the subject matters of the volume, and thus there was lost the valuable contents of what because of being judicial dictum was generally, even if not always, omitted from the headnotes.

If there were a digest or an index-digest of all the valuable judicial dicta found in the 207 volumes of the Mississippi Reports, the bench and bar, and especially the bar, would have at hand ninety per cent of all the law that would be needed by the lawyer in his daily tasks. As an illustration: Some twenty-five years ago one of our chancellors wrote a textbook on the equity practice in our chancery courts, and to obtain the

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[18]Miss. Code § 9032 (1942).

material therefor he read every reported case in our books and made up digest paragraphs upon every point in equity procedure decided or covered by judicial dicta, as well as by decisions, and when he had finished he had more than 3600 such paragraphs, whereas the digests covered only 900 of such points. Thus 2700 points sufficiently authoritative were brought to light, and reflected in the book, which could not be found in any digest. It is true that judicial dictum is found far more frequently in the field of procedure than in that of substantive law; nevertheless, the above authentic incident affirms the main point.

The Legislature in 1948 took notice of this matter and by Miss. Laws 1948, Chapter 416, enacted that "the index to each volume of the Mississippi reports shall consist not merely of the reprinting of the headnotes, but shall be made up in the shorter, more efficient and more economical form as used by the reporter of the United States reports and exemplified in Volumes 320 to 330 U. S." It was known that the headnotes to the United States reports are not confined strictly to the points necessary to decision, but embrace in a large measure what may be properly termed judicial dicta, and the index lines are shortened pointers to the headnote contents, so that the United States reports' indexes are a modified form of the modern word index. Upon submission of the question to our Supreme Court after the passage of the Act of 1948, it was decided by the judges that the real purpose of the Act was to require a modern word index, not to the headnotes alone but to all the matters in the volumes, that is to say, to judicial dicta as well as to points decided, and such are the indexes to Volumes 204-207.

The use of the modern word-index has now become generally familiar to the lawyer. There was such an index to both of the Hemingway Codes, to the Code of 1930, and such is the index to the Code of 1942, and so with every good text book or encyclopedia. The Bobbs-Merrill Company, publisher some thirty years ago of one of our best digests, has announced that following along the same lines as the indexes to Volumes 204-207 of the Mississippi Reports, it will publish a complete word-index to all our appellate decisions going back to Walker, this to be with pocket parts so as to make it a permanent feature of the lawyer's library.

Entire familiarity with a modern word index has therefore now become of major importance, and for further familiarization we might well take a few moments' time to consider here how such an index is made up, and so understanding we may know more precisely how to use one. The problem in making a word index is to compose the index lines in such a way as to bring forward to the beginning of each line the most pertinent word, and to assemble the lines alphabetically under the most pertinent principal subject or subjects, arranging the latter also in an

alphabetical order. The user of the index will, therefore, as a general rule, consult first the principal or most pertinent subject rather than the secondary, and thereunder, will look at the beginning of the line for the most pertinent noun or verb, not for an adjective, adverb, participle or preposition unless the matter is such that a noun or verb is not reasonably available at that point. If the searcher does not find the matter at the first place he looks, he should think of another pertinent subject or word and so on until the matter is found. What appears as a pertinent word or subject to one searcher may not occur to another as such; wherefore, all matters of importance are made to appear at two or three or more different points in the index, or wherever it may be reasonably previsioned that any searcher may look.

Often, however, an impatient searcher, after looking at one or two places where he thinks the matter ought to be and not finding it there, will toss the index aside with the exclamation that it is worthless, when another searcher looking for the same point will readily find it in a few moments. Some of our indexes known to have been prepared by the highest skill, an example of which is the index to our Code of 1942, have been now and then denounced by users who in fact did not know precisely how to handle a word index, but the demerit there is probably for the searcher and not for the index, considering that any index must have reasonable limitations upon its length and multiplied detail. An index which, on every point in a book, would have an unnecessary number of index lines to that point, would be larger than the book itself.

Delivery Dates of the Reports

The Code [19] requires that each volume of the reports shall be published within six months after the date of the delivery of the last opinion in that volume. For some several years in the past this statute had often been neglected or disregarded, and this, together with some other facts which have been mentioned, resulted in a substantial, if not serious, decline in the subscription list among the lawyers of the State. Experienced publishers agree that a prompt publication of successive volumes is essential to a stable list of subscribers. Earnest and persistent efforts have been made by the present reporter to eliminate this arrearage, so that now the current volumes are being delivered on time, even if with but little time to spare, and steps are also being taken in the attempt to restore the list of subscribers.

Some publishers, experienced in state reports, agree also that, under modern conditions, the subscription list to state official reports cannot

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[19] Miss. Code § 9035 (1942).

be made to include the majority of lawyers unless weekly advance sheets are issued, these to be in the hands of subscribers within a week or ten days from the date of the delivery of each opinion, preferably a week. This is being done, and has been done for several years, in our neighboring State of Arkansas as well as in several other states, and is being adopted in still others. Under this plan the opinions in the advance sheets with headnote lead lines stand over in type awaiting the insertion of the final or full headnotes, the briefs, etc., for the permanent bound volume. This plan, if decided upon, cannot be put into operation in this State until the expiration of the present publisher's contract, fifteen months from now. In the meantime it may be that a questionnaire concerning these problems will be addressed to every member of the bench and bar of the State, and it is therefore requested that some thought be given to the subject by them during the next twelve months.

For many years there has been a lack of uniformity in the opinions of the Court in the matters of grammar, spelling, punctuation, capitalization, hyphenation, abbreviation, and more of the like, especially in dictated opinions, which because of the pressure of the dockets, have become more and more frequent, and of course there was a similar want of uniformity in the briefs. The reporters have not deemed themselves authorized or under any duty to edit the opinions, except as to errors so palpable as to be beyond discussion, and, since the opinions were not edited, the briefs as to the matters mentioned were allowed to stand also.

During the first part of the present year, the reporter made up a style list covering a great many instances where these differences have actually occurred, and would be most likely to occur in the future, and submitted the list to the judges for attention in the summer vacation when they would have a better opportunity to attend to a matter of that kind. The judges readily agreed to cooperate, and that attention to the matter was desirable. On the reconvening of the Court in September, 1950, the list was thoroughly canvassed by the entire membership of the Court including the commissioners, and as revised it was furnished to each judge and commissioner, to the secretaries and to the reporter, to be followed by all in the opinions, and by the reporter in the briefs, and direction was given that as to instances not covered by the list, the manual of style issued by the Government Printing Office should control.

In addition to the consideration that correctness of style is desirable, and that there shall be uniformity therein, the impression of carelessness and inattention, and the consequent suspicion that carelessness and inattention may have entered into the substance of the situation, are avoided.

State Bar Section

JURY APPORTIONMENT OF DAMAGES AND THE SURPLUSAGE RULE

*Gibson B. Witherspoon**

In this enlightened age juries are prone to go beyond their instructions and often add something to their verdict, which may either render the judgment void or which may be treated as surplusage. There is no line of separation in the joint liability of joint tort-feasors; the tort being an integral thing and indivisible, any claim for injuries arising therefrom runs through and embraces every part of the tort, so that the liability of one tort-feasor cannot be carried into any portion of the joint tort so as not to be followed by an equal liability of the other tort-feasor. Therefore, either or any of the wrongdoers may be held liable for the whole of the damages resulting from their wrongful acts. In the absence of any statutory authorization, no apportionment of compensatory damages may be made between joint tort-feasors.[1] In actions against two or more persons for a single tort it is improper to return two verdicts for different sums against different defendants upon the same trial, as there can be only one verdict for a single sum against all who are found guilty of the tort, irrespective of the degree of culpability. It is immaterial that defendants plead separately or are charged with distinct and different acts contributing to the injury.[2]

The Problem Presented

Under the above stated rule, verdicts which attempt to apportion liability of joint tort-feasors by directing the amount which each shall pay are clearly irregular. Granting that such verdicts are irregular, it does not follow that the court will have to grant a new trial, as often such verdicts may be corrected provided such a correction is one as to form. It has long been recognized that the court not only can but should correct merely formal errors in verdicts.[3] However, a serious conflict in meaning is to be found in those verdicts which simply apportion the damages against tort-feasors, as illustrated in the examples which follow. Where the jury seeks to apportion damages between joint feasors, there are at least five distinct lines of procedure recognized by respected tribunals in various jurisdictions.

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[1]Watts v. Combs, 244 Ala. 31, 12 So.2d 189 (1943); Whitney v. Tuttle, 178 Okla. 170, 62 P.2d 508 (1936); Klepper v. Seymour House Corp., of Ogdensburg, 246 N.Y. 85, 158 N.E. 29 (1927).

[2]52 Am. Jur., Torts, § 123.

[3]Koon v. Phoenix Mutual L. Ins. Co., 104 U.S. 106 (1881); Settle v. Alison, 8 Ga. 201 (1850); Reppert v. White Star Lines, 323 Pa. 346, 186 Atl. 788 (1936); Minot v. City of Boston, 201 Mass. 10, 86 N.E. 783 (1909).

(1) In the first, the courts hold that the plaintiff may elect his best damages, that is, the highest amount awarded against any of the defendants, and enter a judgment therefor against all those found guilty.[4] A verdict was returned against *A* for $1,500 and against *B,* the other defendant, for $6,000, and was held correctible by having the best or greatest damages affirmed as the verdict against both, or by the plaintiff's election of a single judgment against either of the defendants for the sum assessed against him with a *nolle prosequi* as to the other.[4]

(2) In the second, the courts take the opposite view holding that where damages have besen apportioned by the jury, the court in correcting the verdict must assess the lowest amount as the joint damages against all. Thus in a case against a company who employed the deceased and a utility company which furnished electricity to the employer for injuries resulting due to the alleged negligence of both defendants, it was held that the resulting verdict of $14,000 against the utility and $4,000 against the employer should have been modified by the lower court so as to render judgment against both tort-feasors for the lowest sum assessed against either of them.[5]

(3) In the third, the courts hold the verdict should be set aside and a new trial granted. Where a bank and its vice-president were sued for deceit, and the jury returned a verdict for $28,000 against the vice president and $26,000 against the bank, the court denied plaintiff's motion that it should ignore the attempted apportionment by the jury and enter a judgment against both defendants for the aggregate amount, saying, "It is not a case where the verdict after establishing joint liability for the entire damages seeks to apportion the liability between the defendants. . ." But here the amount found against each defendant is the very essence of the verdict and the amount awarded cannot be struck out without destroying the verdict in its entirety.[6]

(4) In the fourth type, the courts hold that the plaintiff may elect which of the defendants he will take judgment against, dismiss as to the others and have a judgment against the defendant of his choice for the amount the jury awarded against him. For example, a jury returned a

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[4]City of Fort Worth v. Williams, 55 Tex. Civ. App. 289, 119 S.W. 137 (1909). See Polsey v. Waldorf-Astoria, 216 App. Div. 86, 214 N.Y. Supp. 600 (1926), *appeal dismissed,* 243 N.Y. 553, 154 N.E. 602 (1926); Kinsey v. William Spencer & Son Corp., 281 N.Y. 601, 300 N.Y. Supp. 391, 22 N.E.2d 168 (1939); Curtis v. San Pedro Transfer Co., 10 Cal. App. 2d 547, 52 P.2d 528 (1935).

[5]Southwest Gas & Electric Co. v. Godfrey, 178 Ark. 103, 10 S.W.2d 894 (1928). See also, Wear-U-Well Shoe Co. v. Armstrong, 176 Ark. 592, 3 S.W.2d 698 (1928); Whitney v. Tuttle, 178 Okla. 170, 62 P.2d 508 (1936).

[6]Ohio Valley Bank v. Greenebaum Sons Bank and Trust Co., 11 F.2d 87 (1926). See also Note, 30 A.L.R. 792 (1924); 108 A.L.R. 794 (1937); and Oldham v. Aetna Ins. Co., 17 Cal.2d 144, 61 P.2d 503 (1936).

verdict against both defendants, naming them, for $6,500 damage. Accompanying the verdict was a slip of paper in the handwriting of the foreman, reading: "Father McCarthy $1,750.00; John Gould $4,750.00." McCarthy and Gould, the defendants, objected to the entry of the judgment on this verdict, but the court overruled the objection and entered a verdict against both defendants for $6,500. On appeal the court held,

> While the attempted apportionment in the instant case appears on a separate slip of paper, such slip was returned with the general verdict and indicates as clearly what the jury intended as though the language thereof had been embodied in the verdict. It does not seem that any reasonable person should entertain a doubt that the jury intended to limit McCarthy's liability for damages to $1,750. We do not. Yet judgment was rendered against him for nearly four times that amount. Had the jury understood that their verdict made this possible it cannot be supposed that it would have been in the form that it was. In the circumstances, we think the judgment a rank injustice to him.[7]

(5) In this class, the court treats the attempt to apportion the damages as mere surplusage and allows the plaintiff to take a judgment against all the defendants for the total damages awarded. In a recent case for personal injuries against three tort-feasors, a jury returned a verdict reading, "We the jury find for the plaintiff as against Meridian City Line, Inc., and City of Meridian, defendants, and assess his damages at $7,000 ($3,500.00 each)." It was held the trial court was within its power in entering a judgment in favor of the plaintiff against Meridian City Lines, Inc., and City of Meridian jointly and severally in the sum of $7,000.00 and discarding as surplusage that portion of the verdict which said "($3,500.00 each)" since the final verdict was an effort on the part of the jury to apportion the damages, which was beyond their power and which the trial court could correctly discharge as surplusage.[8] The court cited with approval a late Maine case,[9] and said, "The jury undoubtedly undertook to apportion among the defendants what part of the verdict each of them, as between themselves, should pay. This amounted only to a recom-

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[7]Mooney v. McCarthy, 107 Vt. 425, 181 Atl. 117 (1935); Rathborne v. Detroit United Ry., 187 Mich. 586, 154 N.W. 143 (1915); Glore v. Akin, 131 Ga. 481, 62 S.E. 580 (1908); City of Birmingham v. Hawkins, 196 Ala. 127, 72 So. 25 (1916); MacHolme v. Cochenour, 109 Pa. Super. 563, 167 Atl. 647 (1933).

[8]Meridian City Lines v. Baker, 206 Miss. 58, 39 So.2d 541 (1949). See also, 52 Am. Jur., Torts, § 124; 25 C.J.S., Damages, § 189; Dextone Co. v. Building Trade Council of Westchester, 60 F.2d 47 (1932); Warren v. Westrup, 44 Minn. 237, 46 N.W. 347 (1890).

[9]Atherton v. Crandlemire, 140 Me. 28, 33 A.2d 303 (1943.

mendation. If it was intended as anything else, it is merely surplusage, and is to be rejected as irregular and void." .

Conclusion

It is believed that the fifth theory, which disregards a jury's apportionment and considers it surplusage, is the better theory. While the authorities are not in harmony, it is said that the numerical weight of authority is that the trial court is entitled to treat all the matter after the finding of joint liability as surplusage.[10] Not only the Federal courts[11] but also at least eighteen highly respected state courts favor this theory.[12] Its great logical conclusion, and the force of its practical application, should continue to gain more and more following in other states.

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[10]52 Am. Jur., Torts, § 124.

[11]Dextone Co. v. Building Trade Council of Westchester, 60 F.2d 47 (1932). (General verdict $11,000, with attempted assessment of $2,000 against one defendant).

[12]California—Weddle v. Loges, 52 Cal. App. 2d 115, 125, P.2d 914 (1942).

Colorado—Morgan v. Gore, 96 Colo. 508, 44 P.2d 918 (1935).

District of Columbia—Washington Market Co. v. Clagett, 19 App. D.C. 12 (1901). (Verdict attempting to apportion damages of "$500.00 by each of the defendants.")

Illinois—Dahlgreen v. Israel, 204 Ill. App. 340 (1917).

Indiana—Lake Erie & W.R. Co. v. Halleck, 78 Ind. 495, 136 N.E. 39 (1922). (Attempted apportionment at $700.00 and $100.00.)

Kansas—Hall v. McClure, 112 Kan. 752, 212 Pac. 875 (1923). (Jury attempting to assess $4,500 against one defendant and $500.00 against the other.)

Maine—Currier v. Swan, 63 Me. 323 (1874); Atherton v. Crandlemire, 140 Me. 28, 33 A.2d. 303 (1943). (Attempted apportionment of "$400.00 each" stricken out.)

Minnesota—Bakken v. Lewis, 223 Minn. 329, 26 N.W.2d 478 (1947); Begin v. Liederbach Bus Co., 167 Minn. 84, 208 N.W. 546 (1926). (Attempted apportionment at $4,250.00 each.)

Mississippi—Gillespie v. Olive Branch Bldg. & Lumber Co., 174 Miss. 154, 164 So. 42 (1935) ($4,000 and $3,500.00); Meridian City Lines v. Baker, 206 Miss. 58, 39 So. 2d 541 (1949).

Missouri—Berryman v. People's Motorbus Co., 228 Mo. App. 1032, 54 S.W. 2d 747 (1932), *cert. quashed,* State *ex rel.* St. Louis Pub. Service Co. v. Becker, 344 Mo. 115, 66 S.W. 2d 141 (1933). (Attempted apportionment of $2,500.00 against one defendant and $1,000.00 against the other.)

Montana—Bowman v. Lewis, 110 Mont. 435, 102 P. 2d 1 (1940). (Jury attempted to assess defendants at $300.00 each.)

New York—Klepper v. Seymour House Corp., 246 N.Y. 85, 158 N.E. 29 (1927), *reversing,* 218 App. Div. 686, 218 N.Y. Supp. 476 (1926). (Attempted apportionment at $20,000.00 and $17,500.00); Wands v. Schenectady, 171 App. Div. 94, 156 N.Y. Supp. 860 (1916). (Jury attempted to apportion damages against two defendants for $700.00 and $150.00.); Post v. Stockwell, 34 Hun. 373 (N.Y. 1885); Schoat v. Marriott, 119 Misc. 92, 194 N.Y. Supp. 849 (1922); Carrig v. Oakes, 173 Misc. 793, 20 N.Y.S. 2d 585, *Aff'd,* 260 App. Div, 24 N.Y.S. 2d 135 (1940), *in effect reversing,* MacDonald v. Kusch, 188 App. Div. 491, 176 N.Y. Supp. 823 (1919), (Where a verdict for $9,000.00 divided at $4,500.00 each was allowed to stand at $4,500.00 as a joint verdict).

Ohio—Cincinnati Traction Co. v. Story, 19 Ohio App. 370 (1923), (Words "$1,500.00 divided equally between each defendant," held surplusage); Cincinnati Traction Co. v. Cochran, 20 Ohio App. 108, 153 N.E. 116 (1923),

(Words, "equally divided," stricken from verdict); George B. Scrambling Co. v. Tennant Drug Co., 25 Ohio App. 197, 158 N.E. 282 (1927), (Words "equally divided" in verdict against three defendants stricken out).

OKLAHOMA—Central Petroleum Co. v. Lewis, 98 Okla. 26, 224 Pac. 186 (1924), (Attempted equal division of damages against defendants).

OREGON—Leach v. Helm, 114 Ore. 405, 235 Pac. 687 (1925); Martin v. Cambas, 134 Ore. 257, 293 Pac. 601 (1930).

PENNSYLVANIA—Emblem Oil Co. v. Taylor, 118 Pa. Super. 259, 179 Atl. 773 (1935), (Attempted apportionment of $440.04 and $146.98).

TEXAS—San Antonio & A. P. R. Co. v. Bowles, 88 Tex. 634, 32 S.W. 880 (1895), *Aff'd,* 168 U.S. 706 (1897), (court pointing out that equal apportionment of $10,000.00 damages should have been stricken out); San Marcos Electric Light & Power Co. v. Compton, 48 Tex. Civ. App. 586, 107 S.W. 1151 (1908); Fort Worth Belt R. Co. v. Perryman, 158 S.W. 1181 (Tex Civ. App., 1913), *cert. denied,* 161 S. W. 1083 (Tex. Civ. App. 1913), (jury attempting to apportion one-third of $2,750.00 to one defendant and two-thirds of that sum to another).

WASHINGTON—Lindsey v. Elkins, 154 Wash. 558, 283 Pac. 447 (1929), (attempted division at $2,000.00 and $1,500.00). See also Pearson v. Arlington Dock Co., 111 Wash. 14, 189 Pac. 559 (1920), (attempted apportionment of $7,500.00 in equal amounts between tort-feasors).

Mississippi Law Journal

JOURNAL OF THE MISSISSIPPI STATE BAR
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VOLUME XXII DECEMBER, 1950 NUMBER 1

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NOTES

CONVEYANCING, AND THE NECESSITY OF THE OTHER SPOUSE'S JOINDER, UNDER HOMESTEAD EXEMPTION STATUTES.

Familiar to all, students and practitioners alike, are the homestead exemption statutes.[1] Where property is sought to be conveyed or encumbered one of the factors to be primarily considered is whether or not the property, or any part thereof, constitutes the homestead of the grantor. Necessarily this is so, for if it be ascertained that the res is in fact the homestead, certain particular requisites must be satisfied in order to validate the transaction. Foremost among the formalities to be adherred to is the statutory requirement that the owner's spouse join in the alienation or encumbrance of the homestead by the owner,[2] and with such this paper is concerned.

Normally, the husband is the owner of the homestead property, although in Mississippi the wife may qualify in this position.[3] For the sake of clarity in this note, however, the husband shall be treated as owner in all instances.

Nature of Homestead Exemption

The homestead estate was unknown to the common law, and exists purely as a creature of statutory enactment.[4] The purpose of these statutes is protection of the family home. They prevent creditor's liens from attaching,[5] grant certain tax immunities,[6] and guard against a fraudulent conveyance by one spouse alone.[7] Beyond these borders they do not extend, and their sanctions cannot be alluded to for the purpose of defeating legitimate interests.

The homestead right being a favored one at law, the exemption statutes are construed liberally in favor of the owner of the property exempted.[8] The elements essential to the establishment of a homestead vary among the several jurisdictions; but for Mississippi, the essentials, briefly summarized, are actual residence and occupation of the land by the family as

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[1]Miss. Code § § 317-333 (1942); Thompson, Commentaries on the Modern Law of Real Property, § § 905-948 (1924).
[2]Miss Code § 330 (1942); Note, 45 Annotated Law Reports 395 (1926).
[3]Miss. Code § § 331-332 (1942).
[4]26 Am. Jur., Homestead § 9.
[5]Jones v. Lamensdorf, 175 Miss. 565, 167 So. 624 (1936).
[6]Miss. Code § 9714 *et seq.* (1942).
[7]Yazoo Lumber Co. v. Clark, 95 Miss. 244, 48 So. 516 (1909)
[8]Myrtle v. Garrison, 183 Miss. 526, 184 So. 291 (1938); Zuroski v. McIntyre, 93 Miss. 806, 47 So. 435 (1908); Tiffany, The Law of Real Property, § 1338 (3rd ed. 1939).

the home.[9] Once these requisites are met, the exemption laws are applicable. While it is convenient, and in some ways desirable, to make a formal declaration as to the homestead,[10] it is not incumbent upon the owner so to do,[11] except for the purposes of tax exemption.[12]

By force of the statute, the owner has the privilege of selecting that property which shall constitute the homestead.[13] If a man owns several pieces of property and selects one as his homestead, the wife is bound by such selection. Just as the husband has the right to select what land shall constitute the homestead, he also has the right to remove therefrom and select another.[14] The case of *Ritter v. Whitesides*[15] is illustrative of this power of selection vested in the owner. Ritter, the owner of a sixty-three acre tract which he occupied as a homestead, purchased another, consisting of 188 acres, and moved to the latter with his family. Subsequent to his removal from the sixty-three acre tract he executed a deed of trust on it in favor of a bank, in which his wife did not join. However, he stated therein that no part of the sixty-three acres constituted his homestead. The deed of trust was later foreclosed, the bank becoming purchaser, and this action was prosecuted by Whitesides as subsequent receiver for the bank seeking removal of clouds on the title together with a judgment in personam against Ritter. Ritter defended on the ground that the deed of trust was invalid, his wife not having joined in its execution, but the court held that under his power to select the homestead he had effectively abandoned the sixty-three acre tract and established his homestead on the 188 acre tract.

It will be observed that Ritter stated in his deed of trust that the sixty-three acres did not constitute his homesead, and on this point one must consult the cause of *Kyle v. People's Bank & Trust Company*.[16] There it was held that such statements appearing in the instrument while not binding upon the grantor are declarations against interest in determining the question of fact as to whether the property is homestead property.

The wife is not, contrary to popular belief, invested with an estate in the property of her husband during his lifetime by force of the homestead

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[9]E.g., Hand v. Winn, 52 Miss. 784 (1876); Vignaud v. Dean, 77 Miss. 860, 27 So. 881 (1899); Note, *State Homestead Exemptions,* 9 MONTANA L.R. 71 (1948).

[10]MISS. CODE § 319 (1942).

[11]Ritter v. Whiteside, 179 Miss. 706, 176 So. 728 (1937).

[12]MISS. CODE § 9729 (1942), as amended Miss. Laws 1946, c. 261, § 15.

[13]Wiseman v. Parker, 73 Miss. 378, 19 So. 102 (1896).

[14]Ross v. Porter, 72 Miss. 361, 16 So. 906 (1895); Ritter v. Whitesides, *supra* note 11.

[15]See note 11 *supra.*

[16]186 Miss. 287, 187 So. 534 (1939).

exemption laws.[17] She is given a mere veto power over his actions in alienating or encumbering the property.[18] This veto power residing in the wife is exercised in a negative manner, *viz.*, by her non-joinder in the execution of the instrument affecting the homestead. If she joins in it, her rights are immediately extinguished.

A very important question arises as to what type of property interest will support an exemption under the homestead laws. Of course a fee will support homestead rights, and in dealing with these rights we generally have such an estate in mind. However, the word "land" as used in the statute comprehends a leasehold.[19] A tenancy at will supports a homestead;[20] and it is generally said that any assignable interest in land is capable of supporting an exemption granted under statutes protecting the homestead.[21]

The General Rule

As noted previously, the right of the husband to alienate or encumber the homestead is subject to the veto power of the wife. Consequently, it may be stated as a general rule that a conveyance by the husband in which the wife does not join is void.[22] However, certain transactions involving the homestead may be consummated solely by the husband. They constitute exceptions to the general rule.

Exceptions Where Wife's Joinder is Not Required

A mortgage, or deed of trust, given to secure the purchase price of property acquired for homestead purposes is valid though the wife does not join in the execution thereof.[23] Although the writer has been unable to find a case exactly in point, it would seem that acquisition of the property and execution of the deed of trust would have to be simultaneous transactions. Otherwise the mortgage or deed of trust would be void without the wife's joinder.

In *Minor v. Interstate Gravel Company*[24] it was held that where a husband contracted to sell land when it was not a homestead, the covenant

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[17]Kimbrough v. Powell, 143 Miss. 498, 108 So. 498 (1926); Gatti v. New Orleans R. & Mill Supply Co., 77 Miss. 754, 27 So. 601 (1899).

[18]Smith v. Scherck, 60 Miss. 491 (1883); Scott v. Scott, 73 Miss. 575, 19 So. 589 (1896).

[19]Johnson v. Richardson, 33 Miss. 462 (1859); McGrath v. Sinclair, 55 Miss. 89 (1877).

[20]Jones v. Lamensdorf, *supra* note 5; King v. Sturges, 56 Miss. 606 (1878).

[21]Clark v. Edwards, 180 Miss. 97, 177 So. 361 (1937); Comment, 8 Ala. Lawyer 193 (1947).

[22]26 Am. Jur., Homestead § 82; McKenzie v. Shows, 70 Miss. 388, 12 So. 336 (1892); Smith v. Smith, 193 Miss. 201, 8 So.2d 879 (1947); Stringer v. Arrington, 202 Miss. 798, 32 So.2d 879 (1947); Comment, 1 U. of Fla. L. Rev. 108 (1948).

[23]Billingsley v. Niblet, 56 Miss. 537 (1879); Jarvis v. Armstrong, 94 Miss. 145, 48 So. 1 (1908); Stuart v. Kennedy & Co., 145 Miss. 728, 110 So. 847 (1927).

[24]130 Miss. 553, 94 So. 3 (1922).

to sell ran with the land, and a deed by the husband alone subsequent to the acquisition of homestead rights in the land by the wife was not void for want of the wife's joinder. In other words, the wife's veto power was unavailing since the prior covenant had precedence over the homestead privileges. In a recent case, that of *Smith v. Smith*,[25] the *Minor* case was cited with approval. The opinion by Justice Anderson in this case renders valid a conveyance by the husband alone, the purpose of which is to correct a former mortgage executed before the property acquired homestead status and in which the description of the land involved was incorrect.

There is also authority in Mississippi which renders valid a renewal of a deed of trust without the wife's signature where the wife had joined in the original instrument.[26]

A very interesting problem is presented concerning the necessity of the wife's joinder, in conveyances affecting the homestead, by the legal principles relating to after-acquired title. The question is by no means novel in Mississippi, the latest decision on the subject being that of *Meyers v. American Oil Company*.[27] There the husband singly executed a deed of trust on property to which he had no title. Subsequently he obtained good title to the premises in question, and settled on it with his wife as a homestead. The controversy arose over the validity of the deed of trust as executed, with the court holding it to be valid.

The statute is specific as to the amount which may be claimed as an exemption.[28] It is not uncommon to find persons homesteading land of a greater quantity than the maximum so prescribed, and without having designated which particular portion constitutes the actual homestead. If such a situation exists and the husband alone gives a deed to the entire tract, it is only operative as to the amount in excess of the exemption allowed.[29] Such a consideration is basic, and operates alike on deeds of trust and mortgages.[30]

With respect to the necessity of the wife joining in the conveyance, a deed of the homestead to the wife is not void for want of her signature.[31]

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[25]*Supra* note 22.
[26]Smith v. Scherck, *supra* note 17; Hambrick v. Jones, 64 Miss. 240, 8 So. 176 (1886); Comment, 27 TEX. L. REV. 390 (1948).
[27]192 Miss. 180, 5 So.2d 218 (1941).
[28]MISS. CODE § 317 (1942).
[29]Hughes v. Hahn, 46 So.2d 587 (Miss. 1950).
[30]State Nat. Bank v. Lyons, 52 Miss. 181 (1876); Howell v. Bush, 54 Miss. 437 (1876).
[31]Williams v. Green, 128 Miss. 446, 91 So. 39 (1922).

If, however, such a deed is to the wife and another jointly, it is void as to the other grantee although valid as to the wife.[32]

The purpose of the protection afforded by the homestead exemption, as noted above, is the preservation of the family home. Therefore, when the marital relation of husband and wife is disturbed the wife's veto power is affected. *Boonville v. Clayton*[33] holds that the husband's deed without the wife's signature is not void where the wife voluntarily entered into a separation agreement with the husband and was living apart from him. Again, it was held in *Sylvester v. Stevens*[34] that the husband's deed was valid where the wife was voluntarily living apart from him and had expressed an intention not to return.

An interesting question arises in the consideration of two particular cases decided by the Mississippi Supreme Court. The first, *Wilson v. Gray,*[35] is a historical landmark in homestead law in this state. The other, *Hughes v. Hahn,*[36] is the latest decision concerning the homestead statutes in this jurisdiction. The opinion by the Chief Justice in the latter case quotes at length from the opinion of Justice Campbell in the *Wilson* case. It is the belief of some who have studied the two that the latter impliedly overrules the former opinion, but judgment will be reserved on this question pending a consideration of the cases.

Wilson v. Gray stands for the proposition that an exemptionist who sells his homestead in order to make a change of residence on which he has resolved, and which he afterwards effects, can, before removal, execute a valid conveyance of the property without his wife joining in the manner prescribed by statute. A peculiar factor in this case is that the wife attempted to join in the conveyance but her acknowledgment as required by statute was defective, and as a result the deed stood as though she had not joined in its execution. When Gray later brought ejectment against Wilson, the grantee, the trial court directed a verdict in their favor on the ground that the wife had not joined in the conveyance. The Supreme Court overruled this decision, holding the wife's joinder unnecessary under the facts. It is to be noted that in so holding the court did *not* rely on the wife's attempted joinder.

In the *Hughes* case, the heirs at law asserted their right to property formerly settled as a homestead by the deceased grantor, but which he had conveyed without the wife's signature. Of particular note is that here also

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[32]Smith v. Stanley, 159 Miss. 720, 132 So. 452 (1931).
[33]155 Miss. 428, 124 So. 490 (1929).
[34]186 Miss. 503, 191 So. 483 (1939); Philan v. Turner, 195 Miss. 172, 13 So.2d 319 (1943).
[35]59 Miss. 525 (1882).
[36]See note 29 *supra.*

there was an attempted execution of the instrument by the wife, taking place subsequent to the husband's death. The court held that this attempted execution of the wife amounted to naught, the heirs' interests having become established at the husband's death.

From the comparison thus far of the two cases it is seen that the attempted joinder on the wife's behalf in each instance was ineffectual, and both conveyances stood as executed by the husband alone.

At the time the deed was executed it was simply a case of the husband deeding the homestead to a third party without his wife joining therein. Is not the general rule applicable in each instance? At first glance it seems as though each deed would clearly be void. The majority refused to avoid the deed in *Wilson v. Gray* because the husband had formed an intention to acquire another residence when he executed the deed, and this was in fact later accomplished.

It would seem that something more than an intention on the part of the grantor to acquire another homestead is necessary at the time a conveyance is made in order to avoid the wife's joinder. Justice Cooper's dissent in *Wilson v. Gray* on this point was well taken. In this regard there is a line of decisions[37] holding that the validity of the instrument is controlled by the circumstances existing at the date of its execution.

In *Hughes v. Hahn* the husband did not intend to, nor did he ever, acquire another homestead. He alone conveyed the homestead and removed with his wife to the home of *her* relatives. The court did not base its decision on the presence or absence of such intention or subsequent acts; it did not have to. The case fell well within the general rule and was controlled by Code Section 330.[38]

Conclusion

How do these two cases leave the situation? The *Hughes* case does not flatly reject or overrule *Wilson v. Gray*. Instead, the later opinion carefully spells out the differentiating aspects of the earlier case. One should not be compelled to strain his concept of justice in concluding that the result was satisfactory in each case.

The result in *Wilson v. Gray* appears justified from two points of view. One relates to the changing of the status of particular premises from homestead to non-homestead. This appears to embrace various points or "steps," such as: (1) a decision to forsake the rights and benefits of the homestead statutes as regards the premises; (2) determination to live

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[37]Beginning with Cummings v. Beesly, 62 Miss. 195 (1885).
[38]Miss. Code § 330 (1942).

elsewhere, permanently; and (3) a physical removal from the premises. Considered as separate and independent of each other, the order of their occurrence might be highly material, and the moment of physical removal might become most important. But, if the "steps" are accepted as integral parts of a whole or concerted "process" to effect such change of status, might not the precise order in which each "step" fits into the overall plan be of less importance? It is submitted that in the earlier case the court adopted this second basis of consideration. Certainly that case would not constitute the first instance in which the courts had refused to decide substantial rights upon the basis of stop-watch precision in point of time.

The other point of view rests more upon equity and public policy. In the original transaction with the Wilsons, $2,500 in money and, presumably, money's worth was paid for the conveyance. At that time, Gray must have intended either to make a valid conveyance or to invoke, subsequently, the homestead statutes to defraud the grantees. So far as the report discloses, neither Gray's wife nor any third party raised or advanced any issue or claim subsequently. Instead, Gray alone elected to obtain by the technical requirements of such statutes. Under the circumstances of the case, he was properly denied subsequent utilization of such statutes as a trap to assure his profit out of the loss of his grantees.

The major conclusion of the *Hughes* case is merely that owner's attempt to convey a homestead as an outright gift to a third party without the participation of the spouse as specified by statute, is invalid, and will not be validated by the spouse's joining in the deed *after* ownership has lodged in the owner's heirs by operation of law. The facts of the case did not include extenuating circumstances to justify departure from strict application of the legislative fiat as laid down in the Mississippi Code of 1942.

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THE USE OF MANDAMUS AS AN ADMINISTRATIVE REMEDY IN MISSISSIPPI

The common law designated mandamus, certiorari, quo warranto, habeas corpus and prohibition as prerogative writs issuing in the name of the King when no other adequate remedy was available.[1] While the writs have ceased to be regarded as prerogative writs, they continue to be designated as extraordinary writs to be used only when other adequate remedies are lacking. Because of the frequent absence of statutory pro-

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[1]For a history of the prerogative writs see I HOLDSWORTH: HISTORY OF THE ENGLISH LAW 226-230; Jenks, *The Prerogative Writs in English Law*, 32 YALE L. J. 523 (1923).

visions for judicial review, Mississippi lawyers have made extensive use of these so-called extraordinary remedies in reviewing administrative action.[2]

It is the purpose of this note to examine in detail the use of one of these extraordinary remedies and the procedure followed in securing it. Because mandamus is perhaps the most commonly invoked of these remedies, this note has been confined to a consideration of that writ.[3]

Statute

The Mississippi statute provides:

> "On the petition of the state, by its attorney-general or a district attorney, in any matter affecting a public interest, or on the petition of any private person who is interested, the writ of mandamus shall be issued by the circuit court, commanding any inferior tribunal, corporation, board, officer, or person to do or not to do an act the performance or ommission of which the law specially enjoins as a duty resulting from an office, trust, or station, where there is not a plain, adequate, and speedy remedy in the ordinary course of the law."[4]

Necessity of a Clear Legal Right in Petitioner to the Relief Sought

Because of the drastic and extraordinary character of the writ of mandamus, the courts act with caution in respect to its issuance and award it only in cases where it clearly appears that under the law it ought to issue.[5] There must be a clear legal right in the petitioner to the

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[2]For studies dealing with the remedies in other states see Brown, *The Use of Extraordinary Legal and Equitable Remedies to Review Executive and Administrative Action in Massachusetts,* 21 B. U. L. Rev. 632 (1941), 22 B. U. L. Rev. 632 (1941); Note, *Judicial Control of Administrative Action in New York,* 33 Col. L. Rev. 105 (1933); Risenfeld, Bauman and Maxwell, *Judicial Control of Administrative Action by Means of the Extraordinary Remedies in Minnesota,* 33 Minn. L. Rev. 569 (1949). For an excellent study dealing with judicial review of agency action in general, see Davis, *Forms of Procedure for Judicial Review of Administrative Action,* 44 Ill. L. Rev. 565 (1949).

[3]For an earlier article on the subject, see Hutton, *Administrative Use of Mandamus in Mississippi,* 5 Miss. L. J. 185 (1933).

[4]Miss. Code § 1109 (1942).

[5]Thomas v. Price, State Auditor, 171 Miss. 450, 158 So. 206 (1934); McHenry v. State, 91 Miss. 562, 44 So. 831 (1907); Board of Police v. Grant, 9 Smedes & M. 77 (1847).

relief sought or else the writ will not lie.[6] It is always refused when the petitioner's legal right is doubtful.

The writ is also invariably withheld where it would be unavailing,[7] nugatory,[8] or useless and its issuance an idle act.[9] Accordingly, it will be denied when the defendant is unable to comply with the mandate, or where the act to be performed would be unlawful, or where the question has become moot.[10] It may be taken as a general rule that the writ will not issue when its issuance can have no possible effect upon the relief sought.

Although mandamus may be brought to enforce a private right of a person when such right entitles him to coerce a mandatory duty, it will not issue where petitioners have suffered no legal injury other than that suffered by the general public. Where the matter is one affecting the public interest only, the action must be brought on the petition of the state by its attorney general or a district attorney and can not be brought by an individual, or by an individual in the name of the state.[11]

It must also appear that the cause of action was in existence at the date the petition was filed for the writ is never granted to take effect prospectively.[12] A demand for performance of an act cannot be made before the time has expired wherein the officer is allowed to act.[13]

As to the rule that formal demand for action must be made upon the officer or agency before mandamus can be sought, the Mississippi courts hold that formal demands are not essential if such demands would be futile or unavailing. This holding is in line with the general maxim that "the law does not require the doing of a useless formality."[14]

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[6]Board of Supervisors of Prentiss County v. State Highway Commission, 207 Miss. 839, 42 So. 2d 802 (1949); Morris v. Robertson, 189 Miss. 592, 198 So. 290 (1940); American Book Co. v. Vandiver, 181 Miss. 518, 178 So. 598 (1938); Alex Loeb, Inc. v. Board of Trustees, 171 Miss. 467, 158 So. 333 (1935); Board of Supervisors v. Adams, 164 Miss. 162, 144 So. 476 (1932); Hiawatha Gin Co. v. Mississippi Farm Bureau Cotton Association, 138 Miss. 605, 103 So. 345 (1925).

[7]State v. Leland Southwestern R. Co., 128 Miss. 312, 91 So. 7 (1922).

[8]Wood v. State, 169 Miss 790, 142 So. 747 (1932).

[9]Wright v. Edwards Hotel & City R. Co., 101 Miss. 470, 58 So. 332 (1912).

[10]A good example of the application of the rule barring the remedy for mootness is to be found in State v. Lawrence, 121 Miss. 338, 83 So. 532 (1920). There a petition for mandamus to compel a recount of votes at a primary election was properly dismissed on the ground that the question had become moot, since the election in which petitioner desired to run as nominee had been held before the case came on for hearing.

[11]Birdsong v. Grubbs, —— Miss. ——, 43 So.2d 878 (1950); Hancock County v. State Highway Commission, 188 Miss. 158, 193 So. 808 (1940); State *ex rel.* Trahan v. Prince, State Auditor, 168 Miss. 818, 151 So. 566 (1934).

[12]Wood v. State, *supra* note 8.

[13]*Ibid.*

[14]State Highway Commission v. Hinds County, 198 Miss. 853, 23 So.2d 893 *suggestion of error overruled* 198 Miss. 853, 23 So.2d 330 (1945).

Existence of a Legal Duty on the Part of Defendant to do the Things Which Petitioner Seeks to Compel

In addition to the requirements of a clear right in petitioner to the relief sought, there must exist a legal duty on the part of the defendant to do the thing which the petitioner seeks to compel.[15] However, mandamus is the appropriate remedy only for the enforcement of legal duties which possess certain characteristics and properties. It lies, accordingly, only for the enforcement of legal duties which exist independent of and prior to the remedy. It is not a creative remedy; it simply compels persons to act and to perform a duty which they were bound to do without its agency.

Thus, the classical function of the writ is "to compel the performance of duties purely ministerial in their nature, and so clear and specific that no element of discretion is left in their performance, but that as to all acts or duties necessarily calling for the exercise of judgment and discretion on the part of the officer or body at whose hands their performance is required, mandamus will not lie."[16] There are numerous Mississippi decisions recognizing this frequently asserted rule that the writ lies to enforce the performance of ministerial acts only and not to control discretion.[17]

The difficulty arises when one attempts to determine which acts are ministerial and which acts are discretionary.[18] The Mississippi Supreme Court classifies acts as ministerial when their performance is required by direct and positive command of the law, with no room for the exercise of discretion. As defined by one court: "Discretion is the power or right of acting officially according to what appears best and appropriate under the circumstances."[19] Thus, determinations to be made on the basis of

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[15]Board of Supervisors of Prentiss County v. State Highway Commission, *supra* note 6; Alex Loeb, Inc. v. Board of Trustees, *supra* note 6; Selig v. Price, 167 Miss. 612, 142 So. 504 (1932); Greenwood v. Provine, 143 Miss. 42, 108 So. 284 (1926).

[16]High, Extraordinary Legal Remedies § 24. (3d ed. 1896) Interstate Commerce Commission v. United States *ex rel.* Humboldt Steamship Co., 224 U.S. 474 (1911).

[17]Clarksdale v. Harris, 188 Miss. 806, 196 So. 647 (1940); *In re* Validation of Bonds of McNeill Special Consol. School Dist., 185 Miss. 864, 188 So. 318 (1939); State v. School Board of Quitman County. 181 Miss. 818, 181 So. 313 (1938); Thomas v. Price, State Auditor, *supra* note 5; Alex Loeb, Inc. v. Board of Trustees, *supra* note 6; Jackson v. McPherson, 158 Miss. 152, 130 So. 287 (1930); Greenwood v. Provine, *supra* note 15; State v. Board, 133 Miss. 562, 98 So. 101 (1923); Robinson v. Board, 105 Miss. 90, 62 So. 3 (1913); McHenry v. State, *supra* note 5; Board of Police v. Grant, *supra* note 5.

[18]For a helpful discussion of this problem, see Patterson, *Ministerial and Discretionary Official Acts*, 20 Mich. L. Rev. 848 (1922).

[19]Romsdale v. Long Lake, 175 Minn. 34, 36, 220 N.W. 166, 167 (1928).

judgments regarding necessity, usefulness, fitness, practicality, propriety, convenience, safety, feasibility, economic security, etc., are discretionary.[20]

The determination of discretionary or ministerial action revolves around the court's interpretation of the creating statute. If the statute operates as a direct command, in the court's interpretation, then the act is ministerial and a proper subject for mandamus. If the court detects any trace of discretionary power on the part of the agency then the act is classified as discretionary and not subject to mandamus as to the performance of that discretionary duty. Although no canons of construction are binding on the courts, the words "may" and "shall" often have significance in ascertaining whether a duty is discretionary or mandatory.[21] The word "shall" usually signifies a command while "may," on the other hand, commonly imports discretion. Too much emphasis should not be placed on canons of construction, however, since the courts usually construe the statute to effectuate what the court believes to be the legislative intent.[22]

Although mandamus cannot be used to direct the exercise of discretion in a particular manner, it is the proper remedy to set discretion in motion where the agency has failed to take any required action whatsoever. The writ can compel the tribunal to act even though it cannot control the manner in which it acts.[23]

Although it is said that mandamus will not lie to compel discretionary action,[24] it may lie to compel a new determination or to require other appropriate action when the administrative board acts so arbitrarily or capriciously that in law it does not amount to a proper exercise of its discretion.[25] The writ will also lie where a determination is so perfunctory or in excess of jurisdiction as legally to be disregarded.

Mandamus is not directed to an office but to the person holding the office.[26] It should be brought against the officer who has the power and duty to act. The writ cannot be addressed to one who has resigned his office because no longer has he capacity to perform the duty. Neither can

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[20]Risenfeld Bauman and Maxwell, *Judicial Control of Administrative Action by Means of Extraordinary Remedies in Minnesota,* 33 MINN. L. REV. 584 (1949).

[21]State *ex rel.* Cowan v. Morgan, 147 Miss. 121, 112 So. 865 (1927).

[22]State v. School Board of Quitman County, *supra* note 17.

[23]Clarksdale v. Harris, *supra* note 17; *In re* Validation of Bonds of McNeill Special Consol. School District, *supra* note 17; Thomas v. Price, State Auditor, *supra* note 5.

[24]It is submitted that the cases disclose many instances where courts *have* controlled the exercise of administrative discretion through mandamus—despite lip service to the contrary. To this effect see Note, *Mandamus in Administrative Proceedings,* 25 IOWA L. REV. 638 (1940).

[25]Note, *Mandamus in Administrative Proceedings, supra* note 24.

[26]Birdsong v. Grubbs, *supra* note 11; State *ex rel.* Cowan v. State Highway Commission, 195 Miss. 657, 13 So.2d 614 (1943).

a successor in office be substituted for the official originally named as defendant.

Apparently, it is well settled in Mississippi that mandamus will not issue against the Governor to compel performance of any of his official duties.[27] Since the executive is a co-equal branch of the government, the courts are without power to compel action on the part of the Governor. The same is true in regard to members of the legislature in the performance of their legislative duties.[28]

THERE MUST BE AN ABSENCE OF ANOTHER ADEQUATE REMEDY AT LAW

In addition to the requirements of a clear legal right in the petitioner to the relief sought, and a legal duty on the part of the defendant to do the act sought, there must be an absence of another adequate remedy at law.[29]

Developed, as it was, for the purpose of supplying defects in justice, mandamus does not supersede legal remedies. Before the court is warranted in issuing the writ it must appear that petitioner has no other plain, adequate and complete method of redressing the wrong or of obtaining the relief to which he is entitled. It is not necessary that the other remedy be available at the time the writ is requested if the petitioner had a clear legal remedy—adequate to enforce his rights—of which he failed to avail himself and which he lost through his own neglect.[30]

While a statutory remedy does not take from the court its common law power to issue a writ of mandamus, the view is generally taken that the existence of such a remedy ought to be taken into consideration when the court's discretion as to the issuance of the writ comes to be exercised. Ordinarily, a statutory remedy which is equally as convenient, beneficial and effective as mandamus will defeat the latter. However, where the statutory remedy is not intended to be exclusive, or is not equally as convenient, beneficial and effective, mandamus will not be precluded.

Mandamus will not lie, as a general rule, where there is a remedy by appeal or by writ of error or by certiorari.[31] However, situations will

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[27]State v. McPhail, 182 Miss. 360, 180 So. 387 (1938); Wood v. State, *supra* note 8; Vicksburg and M. R. Co. v Lowry, 61 Miss 102 (1817).

[28]State v. McPhail, *supra* note 27.

[29]Board of Supervisors of Prentiss County v. State Highway Commission, *supra* note 6; In re Validation of Bonds of McNeill Special Consol. School Dist., *supra* note 17; Garraway v. State, 184 Miss. 466, 185 So. 803 (1939); Hamilton v. Long, 181 Miss. 627, 180 So. 615 (1938); Jackson v. McPherson, *supra* note 17; McHenry v. State, *supra* note 5.

[30]Selig v. Price, *supra* Note 15.

[31]Jackson v. McPherson, *supra* note 17.

arise where appeal is not a "speedy" remedy.[32] Neither will the writ issue to alter or review action taken in the proper exercise of administrative discretion or judgment for the writ cannot be used as a mode of direct review.[33]

Since mandamus is justified only when necessary to supplement the deficiencies of ordinary legal processes, Mississippi, in at least once case, has confined the issuance of the writ to situations where the aggrieved party lacked an adequate remedy either at law *or in equity.*

This apparent reversal of the traditional equity principles appears in the case of *Garraway v. State.*[34] In a proceeding to compel municipal authorities to abate a nuisance by removing a building, the court refused to grant the writ, saying: "The remedy in equity is complete, adequate, speedy, efficient, and available. . . . . The Chancery court is now as speedy as a court of law, and has a more complete machinery under its control for the abatement of a nuisance. . ." Thus the writ was refused on the ground that the petitioner had an adequate remedy in equity. The same results have been reached in other states.[35]

The later case of *Madison County v. State Highway Commission,*[36] though not mentioning the *Garraway* case, seems to overrule by implication that case and brings the Mississippi Supreme Court back to the orthodox view of equity jurisdiction. In that case the Court said:

> "Where, as in our state, the established distinction between common law and equity jurisdiction is observed, injunction and mandamus are not correlative remedies. Moreover, the almost universal test of the jurisdiction of a court of equity to issue injunctions is the absence of a legal or other remedy by which the complaining party might obtain the full relief to which the facts and circumstances may warrant."

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[32]State v. Board of Supervisors of Yalobusha County, —— Miss. ——, 46 So.2d 73 (1950); *In re* Validation of Bonds of McNeil Special Consol. School Dist., *supra* note 17.

[33]Jackson v. McPherson, *supra* note 17; Greenwood v. Provine, *supra* note 15; Board of Police v. Grant, *supra* note 5.

[34]184 Miss. 466, 185 So 803 (1939).

[35]In State *ex rel.* Long v. Carey, 121 Fla. 515, 164 So. 199 (1935), mandamus was denied partly on the ground of availability of relief by injunction. The court stated: "While the relief in equity may not be considered as the adequate relief at law, which would of itself operate to bar mandamus, yet the availability of such relief in equity may be considered by, and it may influence, the court in the exercise of its discretion in awarding or refusing the peremptory writ." To the same effect see State *ex rel.* Juhlman v. Conners, 122 Ohio St. 355, 171 N.E. 589 (1930); State *ex rel.* Saint v. Mayor, 166 La 817, 118 So. 30 (1928). *Cf.* Esldhab v. LaGuardia, 269 N.Y. 437, 199 N.E. 652 (1936).

[36]191 Miss. 192, 198 So. 284 (1940).

The right of an injured party to proceed by an action for damages against the agency officer for his refusal to perform a specific and ministerial duty may defeat recourse to mandamus. This procedure, however, is not necessarily such a specific and complete remedy as will preclude the writ. Since it does not compel a specific act to be done it may not be adequate.

Remedy by mandamus is never superseded by criminal prosecution of the agency officer for neglect of duty. A criminal prosecution, at the most, is merely punitive and not remedial in its nature. It can punish for the neglect of duty but it does not compel its performance, hence, it is not an "adequate remedy at law."

It is apparent from the wording of the statute that the doctrine of prior resort and exhaustion of administrative remedies must be followed before mandamus will lie. Since the writ is available only when there is no other adequate remedy at law, it is obvious that these remedies must be utilized before recourse by mandamus may be had.

The Writ Is Issued Only in the Sound Discretion of the Court

Although mandamus is a legal remedy, its issuance is largely controlled by equitable principles.[37] Since it is a summary and extraordinary writ, it may be refused for reasons comparable to those which would lead a court of equity, in the exercise of its sound discretion, to withhold its protection of an undoubted legal right.[38] The writ is not available to those who do not come into court with clean hands[39] and so may be denied to a petitioner who has been guilty of fraud or bad faith in respect to the matter in controversy.

Mandamus is designed to remedy a wrong—not to promote one.[40] It is designed to compel the performance of a duty which ought to be performed, not to direct an act which will work a public or private mischief or which would be within the strict letter of the law but in disregard of its spirit. It must appear that some just purpose will be served by the writ.[41] If the evils following the issuance of the writ will outweigh those sought to be corrected, the court may well refuse to grant it even though the petitioner shows a clear legal right for which the writ is an appropriate remedy.[42]

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[37]Morris v. Robertson, 189 Miss. 592, 198 So. 290 (1940); Wood v. State, *supra* note 8; McHenry v. State, *supra* note 5.

[38]Overstreet v. Lord, 160 Miss. 444, 134 So. 169 (1931).

[39]*Supra* note 38.

[40]*Ibid.*

[41]State v. Leland Southwestern R. Co., *supra* note 7.

[42]Board of Supervisors of Prentiss County v. State Highway Commission, *supra* note 6; State v. Grenada County, 196 Miss. 806, 17 So.2d 433 (1944); Wood v. State, *supra* note 8.

Procedure

The Mississippi statutes provides:

> "The petition for mandamus shall be filed in the circuit court of the county in which the tribunal, corporation, board, officer, or person made defendant, or some one or more of them, shall reside or be found; but if the judge of that court be interested, the petition may be filed in an adjoining circuit court district."[43]

By reference to Section 1433 of the Mississippi Code, regarding suits against public officers, it will be seen that mandamus proceeding against administrative officers must be brought in the county of their residence.[44]

The petition for a mandamus must set forth the facts which constitute the plaintiff's claim for the writ including the plaintiff's right to have the duty performed, the legal duty of performance, and possibility of performance.[45] The petition is treated as a declaration and defendant pleads to it as if it were an ordinary action at law.[46] The writ cannot become final and binding until summons is served upon the defendant in the usual manner.[47] The usual procedure applicable to actions in the circuit court apply to mandamus proceedings and all issues made by the pleadings are tried and disposed of as in other circuit actions.[48]

If the judgment be that mandamus will lie, the writ is issued commanding the defendant to perform the duty.[49] Failure to comply with the court's mandate may result in imprisonment for contempt of court.[50] The statutes also authorize the court, instead of proceeding against the defendant by attachment, to direct that the act be done by another. Judgment against the defendant is then rendered for the cost incurred in such procedure.[51]

There is no statute of limitations which cuts off the right of a party to apply for the writ of mandamus in Mississippi although undue delay might influence the court in the exercise of its discretion.[52]

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[43]Miss. Code § 1110 (1942).
[44]Birdsong v. Grubbs, *supra* note 11; State *ex rel.* Cowan v. State Highway Commission, *supra* note 26.
[45]Miss. Code § 1111 (1942). State v. Grenada County, *supra* note 42; Alex Loeb, Inc. v. Board of Trustees, *supra* note 6; Chatters v. Coahoma County, 73 Miss. 351, 19 So. 107 (1896).
[46]Miss. Code § 1112 (1942).
[47]Hamilton v. Long, *supra* note 29.
[48]Miss. Code § 1112 (1942).
[49]Miss. Code § 1113 (1942).
[50]Miss. Code § 1114 (1942).
[51]Miss. Code § 1116 (1942).
[52]Klein v. Supervisors of Smith County, 54 Miss. 254 (1876).

Orders of the court granting mandamus are subject to review by the Supreme Court on appeal and may be superseded by the judge granting the writ or by a judge of the Supreme Court.[53] Whether supersedeas is allowed or not is a matter of judicial discretion.[54]

Conclusion

A casual reading of the technical requirements for review of agency action by mandamus should serve to emphasize the need for reform in this branch of administrative law. As stated by Professor Davis:

> "An imaginary system cunningly planned for the evil purpose of thwarting justice and maximizing fruitless litigation would copy the major features of the extra-ordinary remedies. For the purpose of creating treacherous procedural snares and preventing or delaying the decision of cases on their merits, such a scheme would insist upon a plurality of remedies, no remedy would lie when another is available, the lines between remedies would be complex and shifting, the principal concepts confusing the boundaries of each remedy would be undefined and undefinable, judicial opinions would be filled with misleading generalities, and courts would studiously avoid discussing or even mentioning the lack of practical reasons behind the complexities of the system.
>
> The system of extraordinary remedies is brimming over with these qualities."[55]

Despite hazy lines of demarkation and confusion caused by decisions which only intensify the fog, the system of extraordinary remedies still prevails. A litigant must label his pleading at his peril and a vast amount of intellectual energy is expended in ascertaining the correctness of the litigant's choice. As a consequence, a great many cases are disposed of on procedural points and not upon the merits.

A solution has been sought, and partially achieved, in nine states. Only Illinois and New Hampshire, however, have abolished the extraordinary remedies as means for review of administrative action. It is submitted that only in these two states have the most effective and efficient review systems been established.

The simple and obvious panacea for the problem is the total abolition of extraordinary remedies as a means of review of agency action! In

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[53]Miss. Code § 1115 (1942).
[54]Sartin v. Barlow *ex rel.* Smith, 196 Miss. 159, 16 So.2d 372 (1944).
[55]Davis, *Forms of Proceedings for Judicial Review of Administrative Action,* 44 Ill. L. Rev. 565 (1949).

place of these remedies *one* simple form of proceeding for review could be established. As Professor Davis has suggested it could be called merely a "petition for review." This one petition would then be available whenever the administrative action is reviewable and the proceeding would be the same for review of all agency actions regardless of their nature.

The legislature might do a great service to the lawyers of Mississippi by establishing such a simple and effective review proceedings. It is working in Illinois and New Hampshire and it will work in Mississippi.

James R. Billingsley

LEGISLATION

HOUSE BILL 71: RECODIFICATION OF MUNICIPAL LAWS IN MISSISSIPPI

The Mississippi legislature, at its 1950 session, undertook the task of recodifying the municipal laws of the state. As completed, however, the job is not solely one of recodification. The changes are numerous and, in many instances, of great importance. There is a greater uniformity in municipal laws as a result and, it is hoped, greater clarity in interpretation.

This note is concerned with House Bill 71. This is the "omnibus bill." It covers the major municipal functions of creation, abolition and expansion; election; ordinances; general provisions; and general powers. Also included are the laws governing code charter municipalities and commission form municipalities.

All of the seven articles are general in their application except these last two. All repeal similar articles in the Mississippi Code of 1942, with one exception. There has been a failure to repeal Division 20 of the Code of 1942, entitled "General Provisions." Article I of the new act covers much of the same subject matter.[1] Thus we have the problem of repeal by implication. This problem will be examined in detail below, in the section on elections.

Article I: Creation - Abolition - Expansion

Several of the changes under House Bill 71 are so broad as to permeate the entire act. Particularly is this true regarding the creation, abolition, expansion and contraction of municipalities.

The new act places the machinery for such processes in the hands of the chancellor. These matters will be brought to his attention through regular chancery procedure, and resolved by judicial decree.[2] Formerly creation and abolition were accomplished by petition to the governor, and answered by his proclamation thereon.[3] Section 3376 of the Mississippi Code of 1942 set out the old procedure for expansion and contraction.

Under the new act, sections on creation, abolition, expansion and contraction apply to all municipalities in the state.[4] This is of particular importance regarding municipalities with private charters which have been granted some special method of expansion or contraction.[5] It is in keeping with the over all policy of the act, noted above, to bring about uniformity of laws and of operation thereunder among all the state's municipalities.

The new act specifically provides that the federal census shall be conclusive as to all questions of classification.[6] The old act[7] provided that the governor is not necessarily bound by the census. Thus, this new provision apparently does away

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[1]See cross reference table in the appendix.
[2]H.B. 71, Miss. Legislature § § 3, 11, 17, 23 (1950).
[3]Miss. Code § § 3390, 3393 (1942).
[4]H.B. 71, Miss Legislature § 32 (1950).
[5]In 1948, there were 23 private charter municipalities in the state. These were: Aberdeen, Ackerman, Carthage, Columbus, Corinth, Fulton, Greenville, Grenada, Indianola, Natchez, Okolona, Oxford, Plantersville Pork Gibson, Rosedale, Shannon, Utica, Vicksburg, Water Valley, Waveland, Woodville, Yazoo City.
[6]H.B. 71, Miss. Legislature § 26 (1950).
[7]Miss. Code § 3392 (1942).

with any special census and reliance on it. This would seem to mean that there can be no reclassification of a municipality during the decade between federal censuses. In the case of a new municipality, the census taken for charter purposes would probably govern.

No new villages are to be created under the new act.[8] This section, combined with the more stringent provisions regarding automatic abolition (see below), is apparently aimed at insuring to all municipal residents those services to which residence in a municipality should entitled them.

Creation

The new act requires the petition for incorporation to be sworn to by at least one of the petitioners, and that there be a showing of proposed services to be rendered, as well as the reasons for public convenience and necessity.[9] The old statute only asked vaguely for the "aims of the petitioners."[10]

The importance of this change may be realized when considered in connection with the discretion afforded the chancellor under the new act. The Supreme Court held under the old act that once the governor received a petition for incorporation, he was bound to so proclaim, provided that the petition itself was legally sufficient, had been sufficiently signed, and had been published according to law.[11] The same case also held that the governor could neither enlarge nor contract the municipality as proposed.

The new act, in Section 5, gives the chancellor the power to grant the petition "in whole or in part, by modifying or decreasing the territory" included therein. Clearly his authority here is more than ministerial. He may base his ruling on his finding of fact as to the municipal services to be rendered, and the sufficiency of the reasons of public convenience and necessity. Such findings of fact will probably be regarded as conclusive by the Mississippi Supreme Court.[12] He may also contract the proposed boundaries. Whether the power to "modify" might be held to include the power to enlarge is debatable. It is interesting to note that nowhere in the act is such enlargement specifically forbidden.

Expansion, Contraction and Combining

Under the new act, the procedural requirements for expanding, contracting and combining are similar to those under the municipal creation statutes. The municipal authorities must pass an ordinance setting forth the proposal. This proposal is presented in the form of a petition to the chancellor, and the usual chancery procedure is followed thereafter.

It is interesting to note that an appeal under the old act was to the circuit court,[13] and was held to be a trial de novo,[14] even as the proceedings in chancery will be

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[8]H.B. 71, Miss. Legislature § 1 (1950).
[9]H.B. 71, Miss. Legislature § 3 (1950).
[10]Miss. Code § 3393 (1942).
[11]Jackson v. Whiting, 84 Miss. 163, 36 So. 611 (1905).
[12]Stroud v. Loper, 190 Miss. 168, 198 So. 46 (1940); Rawlings v. Anderson, 149 Miss. 632, 115 So. 714 (1928); Terre Haute Cooperage, Inc. v. Branscombe, 203 Miss. 493, 35 So.2d 537 (1948).
[13]Miss. Code § 3379 (1942).
[14]Yerger v. Greenwood, 77 Miss. 378, 27 So. 620 (1899).

under the new act. Under the old act, the burden of proof was held to be on the contestants of the ordinance.[15] Since under the new act the municipality, as petitioner, inaugurates the proceedings, it would seem likely that this burden of proof has been shifted by the change in the statute.

The likelihood of this shifting of the burden of proof is emphasized by the further requirement of the new act that the petitioners show the public convenience and necessity of their proposal; and also, if a proposed expansion is the issue, the public service to be rendered thereby. Under the old act, the only issue presented on appeal to the circuit court was the "reasonableness" of the proposal.[16] This requirement seems to have been construed most liberally in favor of the proposal,[17] in keeping with the holdings that the burden of proving unreasonableness was on the contestants of the ordinance.[18]

Under Section 19 of the new act, the electors themselves may initiate inclusion or exclusion proceedings. This is to be done by petition to the chancery court, signed by two-thirds of the electors of the area in question. This section also retains a provision of the old act prohibiting the relitigation of a question of changed corporate limits for a two year period after such a change had been effectuated.[19] Where a proposed change is adversely determined, there is no limitation in the new act as to how soon the proposal may be again brought up. The old act provided that no new petition would be considered for one year after an adverse ruling on the first one.

In the case of *Gulfport v. Todd*,[20] it was held that where there was a municipal enlargement, the newly included property was liable for municipal ad valorem taxes at the tax lien date next succeeding the date of enlargement, and not before. Section 27 of the new act enacts the decision of this case into statute. Such a rule would seem desirable as a protection to residents of the newly included territory, in view of the cases holding that municipal taxation of these residents is no grounds for their objection to the "reasonableness" of the proposed expansion.[21]

Section 27 goes further than the rule in the *Gulfport* case, and applies to the creation of municipalities, as well as their enlargement. It is submitted that this further application is unwarranted, and will impose an unreasonable burden on newly created municipalities, at a time when their ad valorem tax needs are greatest.

Abolition

The new act permits voluntary abolition by the governing authorities of any municipality of less than 1000 population, through petition to the chancery court.[22]

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[15]Crystal Springs v. Moreton, 131 Miss. 77, 95 So. 242 (1922); Walker v. Waynesboro, 202 Miss. 830, 32 So.2d 455 (1947).

[16]See note 13 *supra*.

[17]Forbes v. Meridian, 86 Miss. 243, 38 So. 676 (1905); Gregory v. Amory, 112 Miss. 604, 73 So. 614 (1916); Kratzer Cured Lumber Co. v. Moorhead, 118 Miss. 736, 80 So. 4 (1918); Walker v. Waynesboro, *supra* note 15; Kennedy v. Kosciusko, 203 Miss. 4, 33 So.2d 285 (1948).

[18]*Supra* note 15.

[19]Miss. Code § 3382 (1942); Wheat v. Poplarville, 144 Miss. 684, 110 So. 434 (1926).

[20]92 Miss. 428, 46 So. 541 (1908).

[21]Forbes v. Meridian, *supra* note 17; Kennedy v. Kosciusko, *supra* note 17.

[22]H.B. 71, Miss Legislature § 23 (1950.)

In keeping with the general policy of the act, the burden is placed on the municipality to show reason for such abolition. Under the old act, the electorate, not the governing authorities, presented the petition to the governor, not the chancellor. There too, the governor's duty was mandatory.[23]

There has been a tightening of the provisions concerning automatic abolition,[24] obviously aimed at securing greater services from the smaller municipalities. There are three conditions under which abolition becomes automatic: (1) Where the federal census shows less than 1000 population; (2) where there is a failure to hold general municipal elections on two consecutive occasions; and (3) where the municipal officers fail to hold a meeting for twelve consecutive months. As to the question of general elections, the records of the secretary of state as to returns made to him shall be the sole evidence in the absence of fraud or falsification or clear mistake; while the municipal minute book shall be the sole evidence of municipal officers meetings, also in the absence of fraud or falsification.

A clarification of the status of these smaller municipalities becomes important when considered in connection with the homestead exemption statutes. It is provided that the land included in the homestead exemption where the home is in a municipality must be continguous;[25] whereas, if the home is outside the municipality, the tracts includable for homestead exemption may be dispoined, and up to five miles apart.[26] There has been complaint in the past of home owners in the inactive municipalities of the state, claiming exemption of non-contiguous tracts. Requiring these municipalities to stand up and be counted should do much to alleviate the situation.

Absorption Statutes Abolished

The two sections of the old act providing for the absorption of a smaller by a larger municipality[27] are repealed under the new act. Limited in application and enacted to meet specific situations, they were of little consequence.

Article II: Code Charters

Section 34 of the new act substantially reinacts Section 3376 of the Code of 1942, regarding the procedure for adoption of the code charter by a municipality. The old act provided for an election on the subject to be held on petition of one-fourth of the electors. The new act also designates more clearly what is to be printed on the ballot to be used in the election.

Municipal Officials

Under the old act, a treasurer was to be elected in those municipalities which had not designated a depository.[28] However, the governing body of the municipality had the discretion of electing the treasurer itself, from its own number, if it so chose. Section 35 of the new act removes the office of treasurer entirely from the realm of elections, and Section 37 makes this office a part of the clerk's duties.

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[23]Miss. Code § 3386 (1942).
[24]H.B. 71, Miss. Legislature § § 21, 22.
[25]Miss. Laws 1946, c. 261, § 12.
[26]*Id.* § 11.
[27]Miss. Laws 1944, c. 207, § § 1, 2; Miss. Laws 1946, c. 377, § § 1, 2.
[28]Miss. Code § 3620 (1942).

Section 35 of the new act accomplishes another change which is of great importance. This change permits the governing body to make all municipal offices except their own appointive. The only condition attached to this power is that such an act must be done by the governing body at least 90 days prior to a municipal election. The joint legislative committee which reported on House Bill 71 recommended that the legislature summarily abolish the election of all municipal officers except those of the governing body itself,[29] but the legislature balked at such a far reaching step.

Section 35, read in connection with Section 37, offers a possible problem in interpretation. Section 37 empowers the mayor and board of aldermen to employ a street commissioner, and "such other officers and employees as may be necessary. . . ." This section then goes on to provide that "All officers and employees so appointed shall hold office at the pleasure of the governing authorities and may be discharged . . . with or without cause. . . ." It is not made clear whether "All officers and employees so appointed" was intended to include those discretionary appointments under Section 35. It may be pointed out here that there is no difference in the appointment procedure of former elective officrs and of any other municipal employee.

If the two sections are intended to apply together, then the new act apparently confers absolute removal power of all municipal employees on the mayor and board of aldermen. There is a serious doubt as to the validity of such a power. It has been held that the act of removing a police captain was judicial in nature, against which a writ of prohibition would lie.[30] It has also been held that the marshall of a municipality is a public officer under Section 175 of the Constitution of 1890, and therefore cannot be removed from office except on indictment and conviction.[31] This case went further, and held that Section 175 applied not only to constitutional offices, but to "all public offices."

Of course, both the offices involved in these two decisions were elective. However, in the majority of decisions in this state, the same rule obtains regarding appointive offices. It has been held that a county health officer is a "public officer" within the meaning of Section 175, and hence cannot be removed by the state board of health without reason, notice and hearing. He may only be removed for good and reasonable cause.[32] A state factory inspector has been held to be a public officer, not subject to arbitrary removal.[33] A city assessor has been held to be an officer within Section 212 of the constitution, thus preventing his holding a federal office at the same time,[34] and a policeman has been held to be a public officer within Section 20 of the constitution, thus necessitating his appointment for a specified time.[35]

On the other side of the picture, it has been held that a statute providing for the removal of a deputy auditor at the pleasure of the auditor[36] was valid, since such deputy auditor was not an officer within either Sections 20 or 175 of the Constitution

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[29]1950 report of the Legislative Municipal Affairs Study Committee, p. 6.
[30]Grover v. Columbus, 132 Miss. 776, 96 So. 521 (1923).
[31]Lizano v. Pass Christian, 96 Miss. 640, 50 So. 981 (1910).
[32]Ware v. State, 111 Miss. 599, 71 So. 868 (1916).
[33]State v. McDowell, 111 Miss. 596, 71 So. 867 (1916).
[34]Kierksey v. Kelly, 80 Miss. 803 (1902).
[35]Monette v. State, 91 Miss. 662, 44 So. 989 (1907).
[36]Miss. Code §236 (1906); Hemingway's Code § 3495 (1917).

of 1890.[37] The secretary-treasurer and business manager of a state institution of learning has also been held not to be a public officer within Section 175.[38]

From these cases it would seem that the validity of Sections 35 and 37 of the new act, with reference to an office in any particular case, will hinge on whether such office is a "public office" within Section 175 of the constitution. The case of *McClure v. Whitney*[39] supplies a guide for such determination. In that case, the court said that the essential difference between an employment and an office is that in an office the duties and powers are prescribed by law, while in the case of a mere employment, the duties, powers and compensation are fixed by the appointing board.

Using this vague rule as a criteria, it would seem that the power to remove "with or without cause" in Section 37 may be invalid as applied to those offices which it is optional with the governing body to either appoint or elect, and would also be invalid as to certain other offices, such as that of street commissioner, which, though appointive, is specifically provided for by the Code.[40]

Aldermen

The new act[41] substantially reduces the number of aldermen permitted to municipalities. The maximum permissible in municipalities of less than 10,000 population is now five, either from four wards with one at large, or all at large. In cities of over 10,000 population, the maximum now allowed is seven, either from six wards with one at large, or all at large. Under the old act,[42] certain classes of municipalities were permitted to elect as high as twelve aldermen.

Article III: Commission Form

The changes in the commission form of municipal government are comparatively few under the new act. However, many of the sections have been superceded by provisions under other articles of the act, designed to apply to all municipalities, regardless of the form of government. It is in this elimination of surplus provisions that the worth of the act is first apparent.

Article IV: Elections

The old act[43] directed the municipal election procedure to follow along the lines of state and county elections. This is changed under Section 65 of the new act, and complete election machinery is set forth.

Scope

This article is apparently intended to apply to all municipalities,[44] including those with private charter. This is pointed up by the fact that Sections 62 and 63, having to do with the time for holding the general and primary elections, are

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[37]State v. Miller, 126 Miss. 358. 88 So. 881 (1921).
[38]McClure v. Whitney, 120 Miss. 350, 82 So. 259 (1919).
[39]*Ibid.*
[40]H.B. 71, Miss. Legislature § 45 (1950).
[41]H.B. 71, Miss. Legislature § 36 (1950).
[42]Miss. Code § 3620 (1942).
[43]Miss. Code § 3768 (1942).
[44]H.B. 71, Miss. Legislature § 68 (1950).

specifically excluded by Section 68 from application to private charter municipalities. This indicates that the legislature considered specific exclusion necessary to prevent said sections from applying.

However, regarding these private charters, we are faced with the problem of repeal by implication. This act does not, of course, undertake to repeal the specific provisions of each of the private charter municipalities. It relies on implied repeal.

Although, as a general proposition, implied repeal of statutes is not favored,[45] a different rule obtains where a revision or recodification is manifestly intended as a substitute for the former legislation.[46] In such cases, the later act is held to control. The cases illustrating these rules, however, are concerned with general legislation. Statutes creating private charter municipalities are in a somewhat different situation.

It has been held that special statutes governing operations of local governmental agencies are not repealed by general laws, unless such repeal is express, or of necessary implication.[47] The courts must decide whether this rule would extend to private charters of municipalities.

Voting Qualifications

Under a new provision of Section 60, an elector who moves from one ward to another more than five days before the date of an election may transfer his registration to the ward of his new residence. If he moves within five days of an election, he may return and vote at the ward of his old residence.

Time for Holding Elections

Section 62 of the new act changes the time for holding municipal elections, and sets up the method for uniformly switching from the election date under the old act to the election date under the new act.

The change is to the first Tuesday after the first Monday of June of every other odd year. This plan is to go into effect in June of 1953. It is submitted that the changes here are advantageous. The four year term should provide a continuity of policy impossible under the old act, under which a two year term was optional. The close proximity of the date of election and the date of taking office (the first Monday of July following the election) will largely eliminate the problems arising from a "lame duck" governing body, and this is emphasized by the proximity of the primaries, which are the second and third Tuesdays in May, respectively.

Initiative, Referendum and Recall

The initiative, referendum and recall provisions of the old act[48] have been abolished.

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[45]Richards v. Patterson, 30 Miss. 583 (1856); State v. Jackson, 119 Miss. 727, 81 So. 1 (1919); Seward v. Dogan, 198 Miss. 419, 21 So.2d 292 (1945).

[46]Clay County v. Chickasaw County Supervisors, 64 Miss. 534, 1 So. 753 (1886); Hollendale Ice Co. v. Board of Supervisors of Washington County, 171 Miss. 515, 157 So. 689 (1934); Craig v. Dun and Bradstreet, 202 Miss. 207, 30 So.2d 798 (1947).

[47]Board of Levee Commissioners v. Parker, 187 Miss. 621, 193 So. 346 (1940).

[48]Miss. Code § § 3769-3779 (1942).

ARTICLE V: ORDINANCES

Section 72 of the new act supercedes Section 3653 of the Code, applying to code charter municipalities, and Section 3806, applying to commission form. This section provides that an ordinance is to be effective no sooner than one month after passage, unless it is an emergency measure. The emergency clause, and the precautions taken to assure against its use except in an actual emergency, are new. The old act merely set up the one month limitation, "unless cause for the contrary be ordered." It was held that cause had to be shown to give the ordinance immediate effect, though a failure to do so merely imposed the one month limitation. It did not invalidate the ordinance.[49]

Section 3806 of the Code also set forth the procedure necessary for validating "every resolution or ordinance passed by the council . . ." It was held that "resolution," as used here, partook of the nature of an "ordinance" when enacted to regulate continuing conditions and constitute a permanent rule. And "order" was held to be temporary in nature.[50] However, for other purposes, it has been held that there are distinctions between "resolutions" and "ordinances."[51]

The new act meets this problem of definition by applying only to "Every ordinance passed by the governing body. . . ."

In connection with this, it is interesting to note that Section 3805 of the Code, though directed only at "ordinances," was held to apply to resolutions also.[52] Section 73 of the new act places this decision in the statute, by applying to "every action taken . . . whether . . . by ordinance, resolution or otherwise."

Ordinance Book and Minute Book

Section 75 provides for a municipal ordinance book, to be kept by the clerk. The validity of an ordinance is contingent on its being properly in the book. Municipalities are given twelve months in which to comply with this mandate. Resolutions and orders are specifically excluded. Under the old act,[53] failure to place an ordinance in the books, on placing it therein improperly, did not affect its validity.[54]

The new act presumes the validity of any ordinance in the ordinance book. This had been held to be the case under the old act.[55]

Section 75 also requires that the clerk keep a municipal minute book, for the recordation of all the proceedings of the governing body. Section 97 of the new act, also providing for a minute book, is largely superflus. It does go further than Section 75, however, in providing that the minute book shall be the sole evidence of all official municipal acts. Hence, an act of the governing body, not recorded, shall be void.

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[49]Streckfus v. Kierksey, 174 Miss. 125, 163 So. 830 (1936).
[50]Evans v. Jackson, 202 Miss. 9, 30 So.2d 315 (1947).
[51]N.O.&N.E.R. Co. v. Picayune, 164 Miss. 737, 145 So. 101 (1933).
[52]Independent Paving Co. v. Bay St. Louis, 74 F.2d 961 (1935).
[53]MISS. CODE § 3656 (1942).
[54]Greenwood v. Jones, 91 Miss. 728, 46 So. 161 (1907); Jimmerman v. Oxford, 190 Miss. 884, 2 So.2d 152 (1941).
[55]Corinth v. Sharp, 107 Miss. 696, 65 So. 888 (1914); Bugg v. Houlka, 122 Miss. 400, 84 So. 387 (1920).

Misdemeanors

Section 3660 of the Code empowered the municipality to enact a general ordinance, making all state misdemeanors offenses against the municipality. Section 78 of the new act provides that all such state misdemeanors are, by the act itself, made offenses against the municipality.

It was held that an ordinance enacted in accord with the old act was prospective in its operation, embracing acts which the state might in the future declare to be misdemeanors.[56] It would seem to follow that this act itself is prospective in a like manner.

ARTICLE VI: GENERAL PROVISIONS

Many of the changes under this article are minor in nature. Only those of particular importance will be discussed.

By way of preface, it should be pointed out that Section 111 of the new act provides that this article shall apply to all municipalities of the state, but further, that in case of a conflict between this article and the provisions of any special charter, or the articles of the commission form, those provisions, and not these, are to govern.

The precedence given the provisions under the commission form is of slight importance, since there is little conflict present. But when applied to the private charter municipalities, a different result obtains. It is probable that all the old private charters have provisions regarding matters which are drastically changed by the new act. Examples of these, to be discussed below, are the claims docket,[57] the municipal attorney,[58] the police court and police justice,[59] and the fees of officers of the court.[60]

The changes regarding these matters are of far reaching effect, and the lack of uniformity may be unfortunate.

Claims Docket

Sections 86 and 87 of the new act provide for a claims docket and the disposition of claims. The procedure set forth is based largely on the procedure for the county claims docket.

This separate claims docket is new. Under the old act, claims and all other matters to come to the board's attention were grouped under the generic "Municipal Docket."[61] Provision for this docket is also made in the new act, by Section 98.

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[56]Smothers v. Jackson, 92 Miss. 327, 45 So. 982 (1908).
[57]H.B. 71, Miss. Legislature § 86 (1950).
[58]H.B. 71, Miss. Legislature § § 95, 96 (1950).
[59]H.B. 71, Miss. Legislature § 103 (1950).
[60]H.B. 71. Miss. Legislature § 105 (1950).
[61]MISS. CODE § 3638 (1942).

Municipal Attorney

The new act prohibits the municipal attorney from handling civil as well as criminal cases which arise in the municipal court. Under the old act,[62] this prohibition extended only to criminal matters. The new act also imposes a one per cent limitation on the fee of an attorney, other than the municipal attorney, who is brought in to aid in matters concerning a bond issue.

Police Court and Police Justice

There is serious doubt regarding the effect of Section 103, which deals with the police court and police justice. The original bill provided for the mandatory election of police justices in all municipalities of over 10,000 population. Municipalities of less than 10,000 were to have discretion either to elect or appoint. As finally enacted, however, the act provides, for municipalities of over 10,000, that ". . . there shall be a police justice, and a prosecuting attorney who shall be appointed by the governing authorities of the municipality . . ." And further, in municipalities of less than 10,000, that ". . . it shall be discretionary with the governing authorities of the municipality as to whether or not a police justice shall be appointed; and in all municipalities where a police justice is not appointed, the mayor . . . shall be the police justice . . ."

The old act provided for the mandatory election of a police justice in municipalities of over 7,000,[63] and for election at the discretion of the municipality in the smaller municipalities.[64] These sections have been repealed.[65]

No mention of the office of police justice is made in Sections 35 or 48, providing for the elective officers of the code charter and commission form of governments, respectively. No mention of "election" is made in Section 103.

Considering all of these factors, it seems that the office of police justice has been completely removed from the realm of elective offices. The effect of the act would seem to be as follows: (1) A police court is mandatory. (2) A police justice is mandatory in municipalities of over 10,000, as is a prosecuting attorney. (3) These two officers shall be appointed in municipalities of over 10,000 population. (4) The appointment of a police justice is discretionary in municipalities of less than 10,000. (5) If a police justice is not appointed, the mayor or mayor pro tempore shall act as police justice.

It is apparent that the wording of the act is difficult and susceptible to more than one construction. But to read into the act any provision for election would be to "strain the judicial process to the breaking point."

Fees

The new act abolishes all fees for officers of the court.[66] Under Section 3649 of the Code, fees were, of course, permitted.

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[62]Miss. Code § 3635 (1942).
[63]Miss. Code § 3645 (1942).
[64]Miss. Code § 3646 (1942).
[65]H.B. 71, Miss. Legislature § 46 (1950).
[66]See note 60 *supra*.

ARTICLE VII: POWERS—GENERAL

In this article, as in the preceding one, there have been many minor changes enacted. Space limitations prohibit mention of most of them here. Those of more general interest will be set forth briefly.

The new act, in Section 123, provides that a person making a subdivision must get the governing body's approval before he can record the map or plat of it, and that the approval and recordation amount to a dedication of all the public ways thereon to the public use, even before they are opened to the public. A recent decision held that where an alley was neither platted nor dedicated, continuous public use for over fifty years did not support the municipality's claim against the fee owner.[67] This decision may have pointed up the necessity for this statute.

The new act, in Section 130, prohibits preferential rates by municipal waterworks.

Section 156 of the new act permits municipalities to dedicate and convey municipal buildings and property to consolidated school districts, under certain conditions. The old act, in Section 3460 of the Code, merely permitted the appropriation of money.

The creation of municipal parks, supervised by a park commission, is now permitted to municipalities with over 2,000 population.[68]

In a like manner, municipalities of over 20,000 population may now avail themselves of the statute providing for the establishment of municipal parking lots.[69]

Section 170 provides for the use of municipal parking meters. To prevent the abatement of several suits now in progress, the provisions of this section are excluded from any suit now pending.

Robert D. Patterson

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[67]Stewart v. Morton, 200 Miss. 160, 26 So.2d 246 (1946).
[68]H.B. 71, Miss. Legislature § § 158-164 (1950).
[69]H.B. 71, Miss. Legislature § 169 (1950).

APPENDIX

The following Tables provide a handy cross-reference between the old statutory provisions pertaining to municipalities and the new provisions enacted in House Bill 171. The first is a "New" to "Old" Table. The second is an "Old" to "New" Table. "X" indicates that a corresponding section is not present.

Table I

New	Old	New	Old	New	Old	New	Old
1	3374	22	3386 3388	40	3622	60	3762
2	3375		3389	41	3623	61	3763
3	3393	23	3386	42	3630 3631	62	3764 3791
4	3393	24	X	43	3632		3792 3793
5	X	25	3386	44	3633	63	3795
6	3393 3395	26	3384 3385 3392	45	3644	64	3765 Supp.
7	3395		3780	46	X		3766
8	3393	27	3376	47	3788 3789	65	3768
9	X	28	3391		3790	66	3796
10	3376	29	3781	48	3794	67	3767
11	X	30	3782	49	3798 3799	68	X
12	X	31	3786	50	3800	69	X
13	3377 3380	32	X	51	3801	70	3653
14	3378	33	X	52	3802	71	3654
15	X	34	3786 3787	53	3803	72	3653 3806
16	X	35	3620 3643	54	3804	73	3805
17	3376	36	3620	55	3809	74	3655
18	3383			56	3811	75	3656
19	X	37	3620 3643	57	3813	76	3657
20	X	38	3621	58	3825	77	3658
21	3386	39	3417	59	X	78	3660

New	Old
79	3661
80	3660–01
81	X
82	X
83	3783
84	3784
85	3808
86	3638
87	X
88	3624
89	3650 3651
90	3625
91	3626
92	3627
93	3628
94	3629
95	3634
96	3635
97	3636 3637
98	3638
99	3640
100	3641
101	3642
102	3643
103	3645 3646 3647
104	3648
105	3649
106	3426 3652
107	3812
108	X
109	3787 3787.1
110	X
111	3785
112	3396
113	3397
114	3398
115	3400
116	3401
117	3402
118	3404
119	3405
120	3406
121	3408
122	3409
123	3410
124	3411
125	3416
126	3418
127	3419
128	3420
129	3421
130	3422
131	3423
132	3424
133	3425
134	3427
135	3428
136	3430
137	3431
138	3432
139	3433
140	3435
141	3436
142	3437
143	3440
144	3442 3462 3463
145	3443
146	3444
147	3445 3821 3822 3823 3824
148	3446
149	3447
150	3403 3448
151	3450
152	3454
153	3455
154	3457
155	3458
156	3460
157	3464
158	3421–01
159	3421–02
160	3421–03
161	3421–04
162	3421–05
163	3421–06
164	3421–11
165	3460–01
166	3460–02
167	3461.5
168	3464–01
169	3460–11
170	X
171	3662 3663
172	X

Table II

Old	New	Old	New	Old	New	Old	New
3374	1	3395	6	3420	128	3439	X
3375	2	3396	112	3421	129	3440	143
3376	10 17	3397	113	3421–01	164	3441	X
		3398	114	3421–02	158	3442	144
3377	27 13	3399	X	3421–03	159	3443	145
3378	14	3400	115	3421–04	160	3444	146
3379	X	3401	116	3421–05	161	3445	147
3380	13	3402	117	3421–06	162	3446	148
3381	X	3403	150	3421–11	163	3447	149
3382	X	3404	118	3422	130	3448	150
3383	18	3405	119	3423	131	3449	X
3384	26	3406	120	3424	132	3450	151
3385	26	3407	X	3425	133	3451	X
3386	21 22 23 25	3408	121	3426	106	3452	X
		3409	122	3427	134	3453	X
3387	X	3410	123	3428	135	3454	152
3388	22	3411	124	3429	X	3455	153
3389	22	3412	X	3430	136	3456	X
3390	X	3413	X	3431	137	3457	154
3391	28	3414	X	3432	138	3458	155
3392	26	3415	X	3433	139	3459	X
3393	3 4	3416	125	3434	X	3460	156
		3417	39	3435	140	3460–01	165
3394	X	3418	126	3436	141	3460–02	166
3394 Supp.	X	3419	127	3437	142	3460–11	169
3394–01	X			3438	X	3461	X

Old	New
3461.5	167
3462	144
3463	144
3464	157
3464–01	168
3465	X
3466	X
3467	X
3468	X
3469	X
3620	35 36 37
3621	38
3622	40
3623	41
3624	88
3625	90
3626	91
3627	92
3628	93
3629	94
3630	42
3631	42
3632	43
3633	44
3634	95
3635	96
3636	97
3637	97
3638	86 98
3639	X
3640	99
3641	100
3642	101
3643	35 37 102
3644	45
3645	103
3646	103
3647	103
3648	104
3649	105
3650	89
3651	89
3652	106
3653	70 72
3654	71
3655	74
3656	75
3657	76
3658	77
3659	X
3660	78
3660–01	80
3661	79
3762	60 171
3763	61 171
3764	62
3765	64
3765 Supp.	64
3766	65
3767	67
3768	65
3769	X
3770	X
3771	X
3772	X
3773	X
3774	X
3775	X
3776	X
3777	X
3778	X
3779	X
3780	26
3781	29
3782	30
3783	83
3784	84
3785	111
3786	31 34
3787 Supp.	109
3787–1	109
3787–3	X
3788	47
3789	47
3790	47
3791	62
3792	62
3793	62
3794	48
3795	63
3796	66
3797	67
3798	49
3799	49
3800	50
3801	51
3802	52
3803	53

Old	New	Old	New	Old	New	Old	New
3804	54	3810	X	3816	X	3822	147
3805	73	3811	56	3817	X	3823	147
3806	72	3812	107	3818	X	3824	147
3807	X	3813	57	3819	X	3825	58
3808	85	3814	X	3820	147		
3809	55	3815	X	3821	147		

JUDICIAL DEVELOPMENTS UNDER SECTION 301 OF THE FEDERAL LABOR MANAGEMENT RELATIONS ACT

Under Section 301 (a) of the Labor Management Relations Act of 1947 (Taft-Hartley),[1] suits for violations of collective bargaining agreements covering employees in industries affecting interstate commerce may now be brought in a United State District Court by employers and labor organizations,[2] regardless of the amount in controversy and the citizenship of the parties.[3] Although it appears from the wording of the statute that Congress merely designated a particular forum for this type of litigation, it may be contended that rights applicable to federal substantive law are inferable from the jurisdictional grant.[4] Section 1(b) of the Act[5] attempts "to prescribe the legitimate rights of both employees and employers in their relations

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[1]61 Stat. 136 *et seq.* (1947); 29 U.S.C.A. § 141 *et seq.*

Section 301. "(a) Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Act, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

"(b) Any labor organization which represents employees in an industry affecting commerce as defined in this Act and any employer whose activities affect commerce as defined in this Act shall be bound by the acts of its agents. Any such labor organization may sue or be sued as an entity and in behalf of the employees whom it represents in the courts of the United States. Any money judgment against a labor organization in a district court of the United States shall be enforceable only agianst the organization as an entity and against its assets, and shall not be enforceable against any individual member or his assets.

"(c) For the purposes of actions and proceedings by or against labor organizations in the district courts of the United States, district courts shall be deemed to have jurisdiction of a labor organization (1) in the district in which such organization maintains it principal office, or (2) in any district in which its duly authorized officers or agents are engaged in representing or acting for employee members.

"(d) The service of summons, subpoena, or other legal process of any court of the United States upon an officer or agent of a labor organization, in his capacity as such, shall constitute service upon the labor organization.

"(e) For the purposes of this section, in determining whether any person is acting as an "agent" of another person so as to make such other person responsible for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling."

[2]Perhaps individuals can also bring such suits since perusal of Section 301(a) in 93 CONG. REC. 3734 (April 17, 1947) suggests that employees may avail themselves of the rights arising under the statute. However, a uniform application of the *expressio unius est exclusio alterius* doctrine of statutory construction would limit litigants to those named: unions and employers. See subdivision entitled "right of a Union Member to Sue," *infra.*

[3]By the elimination of these requirements, Congress extended federal jurisdiction. Thus the federal courts were opened to employers for litigating the type of controversy named in the statute for suits involving less than $3,000 who otherwise might have to forego such suits if their state court did not permit a suit against a union in its own name.

[4]Section 303 of the Act also provides for suit against the unions for activities classified as unfair labor practices under Section 8(b)(4)(A). An attempt will be made in this note, however, to confine the presentation to Section 301 and developments in regard thereto.

On the constitutionality of Section 301, see the note in 57 YALE L.J. 630 (1948) dealing with the question of federal jurisdiction under Article III of the Constitution.

[5]See also Sections 8(d), 301(a)(b), and 303(a) of the Act which refer to the "interstate commerce" features of the Act.

affecting commerce." Under the commerce clause,[6] Congress has the power to fix rights and prescribe liabilities of the parties to collective bargaining agreements "affecting commerce." Moreover, it would be absurd to contend that Congress gave the suitor an empty sack to take to federal court. Unless substantive rights were conferred, a question may arise as to the constitutional basis for this grant of jurisdiction to federal courts without a diversity requirement.[7] It thus appears that by means of a procedural device Congress either created[8] substantive rights, or recognized[9]—in unequivocal manner[10]—their existence.

But whether Section 301 was intended to be merely procedural is not clear. Nor is it clear that Congress intended by Section 301(a) to provide for the application of a uniform substantive law of contracts. In addition, it might be wondered whether there was an intent to relieve the states of litigation in this substantive law field. Logically, however, it may be contended that this latter possibility was apparently within the Congressional intent, particularly since jurisdiction was provided[11] "without respect to the amount in controversy or without regard to the citizenship of the parties."[12] Yet this contention is contra to the prohibition of Section 14(b) of the Act stating that nothing in the Act shall supersede state laws on closed and open shops. Another practical consideration which may defeat such an interpretation and permit dual jurisdiction is the danger of over-working the federal judiciary.[13] Moreover, development of a system of federal law in regard to labor

[6]U. S. CONSTITUTION, Art. I, § 8, cl. 3. It should be noted that the constitutionality of merely procedural rules may be upheld despite absence of jurisdictional criteria. See 1 TELLER, LABOR DISPUTES AND COLLECTIVE BARGAINING, § 398.11 (1940).

[7]The statements of Senator Taft, co-author of the Act, that the purpose of title III, of which Section 301(a) is the first section, "is to give the employer and the employee the right to go to the Federal courts to bring a suit to enforce the terms of a collective bargaining agreement" are pertinent here. 93 Cong. Rec. 4265 (April 28, 1947).

[8]Senator Murray remarked that the "Federal courts have always had jurisdiction to entertain suits for breach of collective bargaining contracts . . . where the amount in controversy fulfills the present $3,000 requirement and diversity of citizenship . . ." 93 Cong. Rec. 4153 (April 25, 1947). He neglected to add that this was true where the federal court sat in a state which recognized unions as entities for suits against them. His substitute proposal permitted suits in Federal courts only after these two traditional requirements had been shown. 93 Cong. Rec. 5118 (May 12, 1947).

But it appears to have been well settled even before the enactment of this section that an action for damages resulting from breach of a collective bargaining agreement could be maintained in the state courts, law and equity. See TELLER, *supra*, § 163.

[9]Crowell v. Benson, 285 U.S. 22, 82, n. 22 (1932) contains a compilation of cases illustrating the dependence of federal district courts' jurisdiction on the will of Congress.

[10]GREGORY & KATZ, LABOR LAW: CASES AND MATERIALS, 957 (1948).

[11]Section 301(a).

[12]Section 303, however, appears to make this requirement. See Lach v. Hoisting & Portable Power Shovel & Dredge Engineers' Local 4, etc., 86 F. Supp. 463 (D.C. Mass. 1949).

[13]Senator Murray, foreseeing the possibility that Section 301 might impose an unnecessary load on the federal system, stated that "abandonment of the present amount in controversy and diversity of citizenship requirements is an unwise departure from existing law, which would impose . . . increased burden upon the Federal courts, already weighted down with litigation . . . . . it is obvious that there are human limitations upon the capacity of present staffs and that increase in litigation can only be met by an increase in the number of judges and court personnel . . . The alternative would be a breakdown in our judicial system." 93 Cong. Rec. 4153 (April 25, 1947).

See also the Secretary of Labor's testimony in *Hearings before the Committee on Labor and Public Welfare on* S. 55 80th Cong., 1st Sess. Part I, pp. 56, 57 (1947).

contracts, if done in the characteristic case-by-case manner, might necessitate a vast amount of time for development. Hence, in place of the desirable uniformity in substantive law, two separate bodies of law pertaining to labor contracts are likely to develop simultaneously.[14]

At any rate, this new statutory right of suability received its christening from a hostile labor audience, an incomprehensive (almost bewildered) consumer public and a severe White House criticism in the form of a veto.[15] But the time lapse since the enactment of this portion of the Taft-Hartley Act has not thus far substantiated the major fear of the unions: depletion of union treasuries.[16] Time has neither created a "Pandora's box" of vexatious litigation,[17] nor has the Act quite existed as an unused big stick.

The litigation thus far indicates answers to some of the foregoing problems. From the comparatively small number of suits under this section already processed by the federal district courts, even the following limited analysis discloses that several of the more important principles which have emerged are in regard to: constitutionality;[18] injunctive relief;[19] arbitration relief;[20] jurisdiction other than federal

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[14]But apparently this would only go so far as to permit suits by unions or employers in state courts, the procedural law of which state already included methods for suits against labor in unincorporated associations, and in the federal district courts. See 57 YALE L.J. 636, n. 23.

[15]See the President's Veto Message of June 20, 1947, reproduced in THE NEW LABOR LAW, Bureau of National Affairs, Inc., (1947) appendix F.

[16]In the famous Danbury Hatter's case, Lawlor v. Lowe, 235 U.S. 522 (1915), 197 union members were ordered to pay $240,000. But Section 301(b) appears to protect individual members from the assessment of such money judgments. That section unequivocally states that "any . . . judgments against a labor organization (in a federal court) . . . shall be enforceable only against the organization as an entity and against its assets, and shall not be enforceable against any individual member or his assets."

But this does not seem to prevent bringing of the action against the *members and officers* of a labor organization, and levying of a subsequent money judgment against them. See *Wollette, Labor Relations and Federal Law,* University of Washington Press, (1949).

[17]Senator Wayne Morse thus expressed his fears as to the harrassment and weakening of unions. 93 Cong. Rec. 6608 (June 5, 1947). See also, THE NEW LABOR LAW, *supra* note 14, at p. E (1) 4, and *supra,* note 14.

[18]Colonial Hardwood Flooring Co. v. United Furniture Workers, 76 F. Supp. 493 (D.C. Md. 1498), *aff'd* 168 F.2d 33 (4th Cir. 1948); Wilson & Co. v. United Packinghouse Workers of America, 83 F. Supp 162 (S.D. N.Y. 1949). It should be remembered that where constitutionality of Section 301, 29 U.S.C.A. § 185. is drawn in issue, the United States may intervene under 28 U.S.C.A. § 2403.

[19]Alcoa Steamship Co. v. McMahon, 81 F. Supp. 541 (S.D. N.Y. 1948), aff'd 173 F.2d 567 (1949); United Packinghouse Workers of America v. Wilson & Co., 80 F. Supp. 563 (N.D. Ill. 1948); *dicta* in Amalgamated Ass'n., etc. v. Dixie Motor Coach Co., 170 F.2d 902 (8th Cir. 1948); Local 937, U.A.W. v. Royal Typewriter Co., 88 F. Supp. 671 (D.C. Conn. 1949).

[20]Metal Polishers' Union v. Rubin, 85 F. Supp. 363 (D.C. Penn. 1949), Colonial Hardwood Flooring Co. v. United Furniture Workers, *supra,* note 16.

district courts;[21] effect of non-compliance with non-communist affidavit requirements;[22] right of a union member to sue;[23] sufficiency of allegations in declaration;[24] necessity of a written contract;[25] agent for process where international union is a party defendant;[26] and effect of the motion to dismiss.[27]

Constitutionality

The constitutional validity of Section 301 apparently rests upon the creation of a federal substantive right, yet one which also permits the application of the substantive law of the states.[28] In the *Colonial Hardwood Flooring Company*[29] decision, the damage suit was held to have arisen under the laws of the United States. Following this finding the court of the Fourth Circuit then dismissed the contention that ". . . the alleged retrospective operation on contracts" existing prior to the Act was violative of the due procses clause. In the case of *Wilson and Company v. United Packinghouse Workers*,[30] the court denied a motion for dismissal of the damage suit made on the ground of improper jurisdiction. While doing so the court said:

> "There can be no doubt that Congress, under its power to regulate commerce, could constitutionally create such substantive rights. . . It is . . . a suit arising under the law of the United States."

Injunctive Relief

Is private injunctive relief still available to prevent breach of collective bargaining agreements? The majority[31] of the courts confronted with the issue have established the nonavailability of this traditional remedy.[32] In the *Alcoa Steamship* case,[33] the court "reluctantly" conceded its lack of power to enjoin the defendant union or any of its members from violating the terms of their collective bargaining

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[21]Juneau Spruce Corp. v. International Longshoremen's Union, 83 F. Supp. 224 (D.C. Alaska 1949).

[22]United Steel Workers v. Shakesphere, 84 F. Supp. 267 (S.D. Mich. 1949); Oil Workers' International Union v. Elliott, 73 F. Supp. 942 (N.D. Texas 1947).

[23]Schatte v. International Alliance of Theatrical Stage Employees, 84 F. Supp. 669 (S.D. Calif. 1949); Snoots v. Vejlupek, 87 F. Supp. 503 (N.D. Ohio 1949); State v. Eighth Judicial District Court, — Nev. —, 207 P.2d 990 (1949), where it was held that injunctions could not be obtained by private parties in either federal or state courts under the National Labor Management Relations Act.

[24]Wellman Co. v. Mechanics Educational Society, 9 F.R.D. 206 (N.D. Ohio 1949).

[25]United Shoe Workers v. LeDanne Footwear, 83 F. Supp. 714 (Mass. 1949).

[26]Paterson Parchment Paper Co. v. International Brotherhood of Paper Workers, 83 F. Supp. 928 (D.C. Penn. 1949); Daily Review Corp. v. International Typographical Union, 9 F.R.D. 295 (D.C. N.Y. 1949).

[27]Daily Review Corporation, *supra* note 25.

[28]Federal Rules of Civil Procedure 17(b).

[29]*Supra* note 17. *But see* Denver Milk Producers, Inc. v. International Brotherhood of Teamsters, etc., — Colo. —, 183 P.2d 529 (1947), *cert. denied*, 334 U.S. 809 (1948), ". . . because of the inadequacy of the record."

[30]*Supra* note 17.

[31]United Packinghouse Workers of America v. Wilson & Co., 80 F. Supp. 563 (N.D. Ill. 1948); Alcoa Steamship Co. v. McMahon, 81 F. Supp. 541 (S.D. N,Y. 1948); Amazon Cotton Mill v. Textile Workers' Union, 167 F.2.d 183 (4th Cir. 1948); International Longshoremen's Union v. Sunset Line & Twine Co., 77 F. Supp. 119 (N.D. Calif. 1948).

[32]*Contra*: Mountain States, etc. v. Mountain State Tel. & Tel. Co., 81 F. Supp. 397 (D.C. Colo. 1948).

[33]*Supra* note 30.

agreement. In noting the absence of this remedy,[34] the court pointed out that Congress, while authorizing such suits for damages in the federal district courts, had not expressly withdrawn the anti-injunction restrictions of the Norris-LaGuardia Act and, therefore, they were still applicable. In the *United Packinghouse Workers v. Wilson and Company*,[35] however, although the court dismissed the bill for an injunction against the employer, it remarked:

> ". . . if the plaintiff can plead and establish a claim for damages growing out of a breach of its contract . . . (the Act of 1947) confers jurisdiction upon this court to hear and determine such a suit."

Thus this court would decide the merits of such a controversy when damages were demanded, yet not the merits of the same controversy when the prayer was for an injunction. The National Labor Relations Board evidently has jurisdiction in the latter situation, as well as situations where there is petition for injunction based upon charges of unfair labor practices.

Arbitration Relief

The United States District Court for the Eastern Division of Pennsylvania denied a stay of proceedings in a suit brought by a union for damages resulting from breach of a "no-lockout" clause in the agreement.[36] In denying such motion, the court considered it unreasonable to suppose that, under a contract expressly forbidding lockouts pending arbitration of disputes, damages resulting from a lockout were contemplated as the subject of arbitration.

Jurisdiction other than Federal District Court

In another recent case[37] it was unsuccessfully contended that the District Court of Alaska did not have jurisdiction of a suit under Section 303 since jurisdiction was limited to the courts defined in Section 301 of the Act. Petitioner sought the unusually large sum of $193,000 damages which allegedly resulted from the de-

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[34]"Although Section 301 says nothing about specific performance of collective agreements, presumably that particular remedy was intended, since otherwise the enforcement of collective bargaining agreements by either side against the other would be largely illusory." Gregory, Labor and the Law 450 (Rev. Ed. 1949).

[35]*Supra* note 30.

[36]Metal Polishers', etc. Union Local No. 90 v. Rubin, *supra* note 19. There the court said that the arbitration clause in the agreement was for the purpose of preventing a strike and not to arbitrate a strike after it had occurred. Thus a lockout did not present an issue subject to arbitration following a lockout.

"If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been held in accordance with the terms of the agreement providing the applicant for the stay is not in default in proceeding with such arbitration." § 3 of the Federal Arbitration Act, 9 U.S.C.A. § 1 et seq.

[37]*Supra* note 20. Recovery was sought and had in this case, however, under Section 303 of the Act. But in reaching this conclusion, the court relied upon the Act of June 6, 1900, 31 Stat. 322, as amended 48 U.S.C.A. § 101, the material provision of which is as follows:

> "There is established a district court for the District of Alaska, with the jurisdiction of district courts of the United States and with General jurisdiction in civil, criminal, equity, and admiralty causes."

fendant's refusal to permit the employees to perform any services for a certain period. In overruling the demurrer, the Territorial court pointed out that Congressional intent rather than definition and terminology controlled. After conceding that the term "district court of the United States" was inconsistently used throughout the Act, it answered that a sensible construction of the legislative intent required that this section be interpreted to give the District Court of Alaska jurisdiction of these damage suits. The court properly ruled that the Act intended to establish a fundamental labor policy for the nation as a whole and to create a uniform procedure for the enforcement of such policy in the Territories as well as in the States and the District of Columbia.

Effect of Non-compliance with Non-communist Affidavit Requirement

It was recently decided by a Michigan district court that despite non-communist affidavit requirements of the amended National Labor Relations Act, a non-complying union may maintain a damage suit against an employer.[38] This conclusion followed an earlier determination that such requirements were merely a prerequisite for participation in a proceeding before the National Labor Relations Board. As a result, another *non obstante* clause[39] has been added to this section. The addition of this exception is regrettable for two reasons: (1) it appears to be legislation by the courts, and (2) under it federal courts may furnish a channel for income for communist dominated unions (and, of course, for the Comintern itself) merely after the proper pleading and proof of an agreement, its breach, and a claim for damages.

Right of a Union Member to Sue

The *Schatte*[40] case illustrated an unsuccessful attempt by individual union members to recover damages resulting from violation of a collective bargaining agreement by their own union. Apparently, such violations constituted a combination which would increase the price of admission to motion picture theatres—which increases plaintiff members would have to pay if, and when, they attended such theatres. In dismissing the complaint, the court said:

> ". . . Congress did not intend to grant jurisdiction . . . without regard to amount or diversity of citizenship of every suit in which an individual member of any union might wish to assert a violation of a labor contract . . ."

The court, continuing, said that the terms of the section indicated that the approprite parties to such suits are limited to labor organizations and employers because: (1) the venue provisions relate only to labor organizations, (2) the capacity to sue or be sued is conferred on labor organizations, and (3) judgments thereunder are enforceable only against labor organization assets. Accordingly, the motion to dismiss was granted.

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[38]United Steel Workers v. Shakesphere Co., *supra* note 21.

[39]Section 301(a): ". . . without respect to the amount in controversy or without regard to the citizenship of the parties."

This appears to have been one of those rare instances where application of the *expressio unius* . . . doctrine would have been most appropriate.

[40]Schatte v. International Alliance of Stage Employees, *supra* note 22; Mackay v. Loew's Inc., 84 F. Supp. 676 (S.D. Calif. 1949).

Obviously, if individual members of the union cannot recover for violation of a collective bargaining agreement, *a fortiori* one neither an employer nor a union should be heard to complain. Consequently, denying present members of a union the right to sue former members also appears quite proper[41]

Sufficiency of Allegations in Declaration

The manner in which a union breached the contract does not effect the liability for damages.[42] Allegations to the effect that the union threatened the employer and refused to arbitrate may be struck as immaterial and prejudicial. The court which arrived at this conclusion also penetratingly observed that the accomplishment of such allegations was to place the union in a bad light. It was further pointed out that in a damage suit of this kind a detailed statement of the loss of business and profits resulting from the strike is matter evidential in nature and not required on a motion for a more definite statement. Thus a party is not required to plead evidential matters as long as the allegations are sufficient to enable the opponent to file a responsive pleading. Neither is the declaration insufficient under the Act when it alleges an agreement and a breach of the agreement, when a copy of such agreement is annexed to the complaint.[43]

Requirement of a Written Contract

Strangely enough, however, it does not appear that a collective bargaining agreement, at least not the provision sued upon, need be in writing for the purposes of suit under this section. Moreover, a provision in the written contract prohibiting modification by any worker, group of workers, or officials does not preclude a modification agreed to orally by the union's collective bargaining representative.[44] In general, subsequent parol agreements adding to or modifying the provisions of a written contract are themselves a part of a valid contract unless rendered invalid by statutory provisions which require designated types of contracts to be in writing in order to be enforceable.[45]

Agent for Process Where International Union is Party Defendant

Where an international union is named as a party defendant with a local, and the principal office of the former is in another state, a federal district court does not have jurisdiction if process is served upon it only in such other state.[46] The court arriving at this conclusion also held that jurisdiction did not vest by virtue of service of process upon the local's president in absence of clear proof that the local's president or the local itself had authority to act as the agent of the international.

Upon first glance, this decision may appear to be contrary to the declared objectives of the Act as found in its preamble: to ". . . equalize legal responsibilities of labor organizations and employers." After a hurried perusal the decision might

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[41]Snoots v. Vejlupek, *supra* note 22.
[42]*Supra* note 23.
[43]Daily Review Corp. v. International Typographical Union, *supra* note 25.
[44]*Supra* note 24.
[45]Gilman & Son, Inc. v. Turner Tanning Mach'ry Co., 232 Mass. 572, 122 N.E. 749 (1919).
[46]Daily Review Corp. v. International Typographical Union, *supra* note 25.

also appear contrary to the provision granting jurisdiction to the federal district courts ". . . without respect to the amount in controversy or or without regard to the citizenship of the parties."[47] In addition, it may be said that "clear proof" of the agent's authority is to some degree stronger than that required by subsection (e) of Section 301 reading: ". . . to make such other person responsible for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling."[48]

However, notwithstanding what may be said for these contentions, it is submitted that this decision in regard to service of process where the international union is a party defendant is correct. In the first place, Section 301(a) permits the bringing of such suits "in any district court . . . *having jurisdiction of the parties*, . . ." (Emphasis added.) Obviously, the Eastern District Court of New York did not have jurisdiction of the international union. The process was ineffective as a result of service of process outside the state.[49] Moreover, the decision appears proper because it recognizes the state's boundaries as the venue limits of the federal court sitting in that state. Finally, in holding the international union there to be without its jurisdiction, that court refused to legislate or engraft another exception upon the statute.

Effect of Motion to Dismiss

As already noted, a complaint alleging an agreement in writing, its breach, and damages is generally sufficient. In order for a court to grant a motion to dismiss for failure to state a cause of action, it is essential that the asserted grounds for dismissal involve no unresolved issues of fact. In the *Paterson Parchment Paper Company*[50] case, the union sought dismissal on the grounds that the agreement was not in effect at the time of the strike (1) because of an alleged notice of termination and (2) because allegedly illegal union security and checkoff provisions in the agreement precluded automatic renewal. In denying the motion the court said that a decision upon the issue at that point "would not only be unwise, but probable reversible error, as well." Presumably upon appeal from the dismissal, the reviewing court would be at liberty to consider the questions of notice terminating the agreement and the allegedly illegal security and check-off provisions as questions of law and rule that the former alone terminated the agreement. Then the possibility of a reversal would become an actuality and the employer seeking damages would be without a cause of action.

Before concluding this short survey of developments under Section 301, some consideration should be given to the enforceability of collective bargaining agreements.[51] Having accepted the fact that Section 301 of the Act does create and confer substantive rights and that unions are amenable to suits for breaching their collective bargaining agreements, and that, as a consequence, they may be treated as legal entities for the purposes of suits in federal courts, the problem becomes

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[47]Labor Management Relations Act, Section 301(a).

[48]"For the purposes of this section, in determining whether any person is acting as an 'agent' of another person so as to make such person responsible for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling."

[49]For venue of federal district courts, see 28 U.S.C.A. § 1391 et seq.

[50]Daily Review Corp. v. International Typographical Union, *supra* note 25.

[51]The wisdom of applying strict notions of contract law to the field of labor management relations is extremely debatable. *But cf*: Chamberlain, "Collective Bargaining and the Concept of Contract," 48 Col. L. Rev. 829 (1948).

relatively simplified. Although it is doubtful that a federal uniform substantive law of contracts will develop from such a situation,[52] if such an event did occur, there would unquestionably be more certainty in this sphere of legal relations. An exclusive jurisdiction in federal courts for these suits would assure greater uniformity of decisions.

On the other hand, if jurisdiction of state courts continues, then it appears that the state courts would be governed by a federal law of labor contracts if such are "suits arising under the law of the United States."[53] Unlimited acceptance of state jurisdiction may frequently present the confusing position for the state courts of having no controlling law for a particular set of circumstances until it had been declared by the federal courts. This is the problem confronting federal judges who search in vain for state law under the doctrine of *Erie v. Tompkins*.[54] In the absence of exclusive jurisdiction in the federal courts, the Jacob's coat that is the law of contracts spreads a multitude of contoversial theories throughout the decisions. Without such an elimination, two separate bodies of law dealing with collective bargaining agreements may develop simultaneously. As a result, a litigant might receive a judgment under the substantive contract law of a state quite different from what he might have received in a federal court with both forums interpreting and applying the Taft-Hartley Act.

At present, there appear to be at least three major doctrines applied to enforcement of collective bargaining agreements, none of which allow an unincorporated union an unqualified right to litigate judicial questions.[55]

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[52]By statutory provision, unincorporated unions can sue and be sued in the courts of at least eleven states: Alabama, California, Connecticut, Louisiana, Maryland, Michigan, New Jersey, Texas, Vermont, and Virginia. Five states permit union funds to be reached by bringing action against the officers and selected members as representatives of the entire membership: New York, Ohio, Rhode Island, Washington, and Wisconsin. In the courts of other states suits by or against unions may be brought under statutes making voluntary associations suable if "engaged in business," or by bringing a class suit, or by utilizing some other procedural expedient. WOLLETT, LABOR RELATIONS AND FEDERAL LAW 119, (1949).

[53]Wilson & Co. v. United Packinghouse Workers, *supra* note, 17.

[54]304 U.S. 64 (1938). Under the decision of this case the federal courts must follow state law. But if state law is not then established, the federal court must itself decide the issue of state law. Meredith v. City of Winter Haven, 320 U.S. 228, 64 Sup. Ct. 7, 88 L. Ed. 9 (1943). And in Huddleston v. Dwyer, 322 U.S. 232, 64 Sup. Ct. 1015, 88 L. Ed. 1246 (1944), the court approved the view of Vanderbark v. Owens-Illinois Glass Co., 311 U.S. 538, 85 L. Ed. 327, 61 Sup. Ct. 347 (1940), that when a state court changes the construction of its law before the final disposition of a case in the federal courts, the latter must change its construction to accord with that of the state court.

Then is it not safe to assume that the reverse of this is true? Or must the states, as parties to the continued, dual jurisdiction of these damage suits, refuse to relieve the injured claimant until the federal law on the issue is established by the federal court? Manifestly this would be absurd. Such a determination would, in fact, fill the state courts with lines of litigants possibly decades in length.

Excellent discussions appear in Judge John J. Parker, *"Erie v. Tompkins: An Analysis of its Proper Area and Limits,"* 35 A.B.A.J. 19 (1949), and Judge Charles E. Clark, *"State Laws in the Federal Courts: The Brooding Omnipresence of Erie v. Thompkins,"* 55 YALE L.J. (1946). Cases are analyzed in 151 A.L.R. 987 and 83 L. Ed. 519.

[55]GREGORY, LABOR AND THE LAW 381 (1946).

Prior to the Taft-Hartley Act, the most significant factor preventing unions from enforcing collective bargaining agreements, or from being held accountable for their own breaches of them was their inability to appear as parties to lawsuits. GREGORY, LABOR AND THE LAW 449 (1949).

Under the "custom" or "usage" theory, there is merely a "gentlemen's agreement" between the employer and the individual employees. Such an agreement is the most that can be said for the nature of the "contract" underlying this theory. In its very "gentlemen's agreement" nature lies the major disadvantage to the union: it can neither sue nor be sued because it has no rights enforceable at law. Under the "contract" neither party is bound legally.[56]

Under the "agency" theory, there is a judicial assumption that the union acts as the agent of its members in obtaining the collective bargaining agreement from the employer.[57] The principal objection to this theory is that it permits only the individual union member to sue for its enforcement, the union again having no enforceable rights of its own. In this respect, the agency and the usage theory are relatively identical.[58]

The remaining primary alternative for enforcement of collective bargaining agreements is the "third-party beneficiary" theory. Under this concept a comparatively recent Mississippi decision[59] went so far as to hold that an employee, although not a union member, who had performed his duties in accordance with the terms of the agreement could sue for its benefits. Thus this theory permits an employee to recover upon a showing that the courts of his state recognize third-party beneficiary contracts and that the contracting parties intended to negotiate for his benefit the contract upon which he sues. Having proved this he may recover. In addition, this doctrine permits the union to sue for enforcement of the contract as well as the employee.[60] But as an individual, a successful suit against him would remain impossible unless the law also recognized a "third-party obligatory" of the contract.[61] Without such recognition there is no duty on the part of the "third-party beneficiary."[62]

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[56]Gregory, Labor and the Law, note 15, 382 (1948).

[57]Note, 31 Col. L. Rev. 1156, at 1159 (1931).

[58]Note, 11 N.Y.U.L.Q. Rev. 262 (1933); 39 Mich. L. Rev. 1109 (1941).

[59]Yazoo & M.V.R. Co. v. Sideboard, 161 Miss. 4, 133 So. 669 (1931).

But in Chambers v. Davis, 128 Miss. 613, 91 So. 346 (1922), the court sitting *en banc* denied injunctive relief to an employee discharged in violation of a collective bargaining agreement, saying that equity could not enforce a contract for personal services. Four justices concurred and two dissented. Yet in the Sideboard case the court said: "That a third party may recover directly on a contract made for his benefit is *not* open to question." (Citing Canada v. Yazoo & M.V.R. Co., 101 Miss. 274, 57 So. 913 (1912). Emphasis added.) Continuing, the court said: ". . . we think it will be found that the best considered of these cases reason the matter down to this: (1) When the terms of the contract are expressly broad enough to include the third party either by name as [or] of a specified class, and (2) the said third party was evidently within the intent of the terms so used, the third party will be within its terms, if (3) the promisee had, in fact, a substantial and articulate interest in the welfare of the said party in respect to the subject of the contract. It seems to us that this is a conservatively sound statement of the rule as applicable to this case, and that the case comes within it." See also note, 31 Col. L. Rev. 1156 at 1158 (1931).

[60]1 Teller, Labor Disputes and Collective Bargaining 504 (1940).

[61]Rice, *Collective Labor Agreements in American Law*, note 1, 595, 44 Harv. L. Rev. 572 (1930): Kayne and Allen, *Union Responsibility and the Enforcement of Collective Bargaining Agreements—A Study of the Background and Application of Section 301 of the Labor Management Relations Act of 1947*, 30 B.U.L. Rev. 1 (1950).

[62]Collective Bargaining, p. 15, published by the National Association of Manufacturers (1945).

Conclusion

Section 301 of the Taft-Hartley Act, at any rate, has bridged the gap created by by the lack of uniformity in the suability of unincorporated labor unions. It has apparently created an entirely new cause of action for the federal courts. To the Congress which passed it the Act no doubt was deemed as an essential element for the future well-being of private enterprise. The flood of anticipated litigation has not yet presented itself before the halls of justice—although the possibility that it may become a "Pandora's box" may yet materialize. A possible explanation for the apparent failure of employers and unions to press such suits may lie in the increased use of arbitration.[63] Another explanation may lie in the contractual "escape channels" adopted by many unions which anticipated liability for wildcat strikes, work stoppages and other contract violations.[64] These escape channels, although possibly constituting unfair labor practices themselves under Section 8(b)(3) of the Act, are characterized by the elimination of no-strike clauses, provisions for arbitration, stipulations as to damages, limitations on specified agents' authority, and inclusion of conditional waivers of damage liability.[65] However, the most easily acceptable explanation for the non-materialization of fears probably lies in the realization by both employers and employees that constant bickering in the courts not only involves increases in delay, and staggering expenses, but also serves to broaden the gap between labor and management which the Act was designed to bridge and will eventually destroy public sentiment.

Frederick Perry Hamel.

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[63]Gregory, *The Collective Bargaining Agreement: Its Nature and Scope,* 1 Wash. U.L.Q. 3 (1949).

[64]Davis, *Standing to Challenge and to Enforce Administrative Action,* 49 Col. L. Rev. 759, 766 (1949).

[65]*Basic Patterns in Collective Bargaining.* Bureau of Nat'l Affairs, Inc., 15:435 (1948).

RECENT DECISIONS

Agency—Civil Liability for Criminal Act

Plaintiff engaged a cab, driven by defendant's servant, to take her from the downtown area to her home. When the cab stopped, she got out, but the driver did not allow her sufficient time to retrieve her billfold which contained the amount sued for. Following the affair, the servant took a patron to a distant city and, on his return, paid the fare to the defendant. Held: The mere circumstance that the tortious act of a servant amounts to a crime does not preclude the injured person from maintaining a civil action against the master for resulting injuries. The test of liability is the same as in cases where noncriminal acts are involved; the act must have been one authorized by the master prior to its commission, ratified after its commission, or committed within the scope of employment. *Horton v. Jones,* 44 So.2d 397 (Miss. 1950).

The law does not recognize any agency for the commission of criminal acts.[1] However, if it be shown that the criminal act was expressly or impliedly authorized by the master,[2] or was the result of the opportunity afforded by the employment of the wrongdoer in the furtherance of the master's business,[3] liability may attach. The difficult question which arises in this type of case is whether the servant, at the time of the offense, was acting within the scope of his employment. Scope of employment is an illusive term. However, it has been held that responsibility attaches only when the injury is done by the servant in the exercise of the functions in which he is employed,[4] and is evaded when the servant acts entirely from his own malevolence and not for the benefit of the master.[5]

The well-recognized general principle is that the civil doctrine of *respondeat superior* has no application to criminal law, since in order to render a person criminally responsible, it is essential that he have the requisite criminal intent at the time the act was committed.[6] Accordingly, there is a great difference between the authority which will make a man criminally liable for the acts of his servant and that which will make him civilly liable. In a civil action, the master may be found liable for acts done by his servant in the course of duty, notwithstanding that such acts are in fact unauthorized[7] . . . or even forbidden.[8] Thus, we arrive at this conclusion: although a servant's criminal act was unauthorized or even forbidden by the master, still the master may be civilly liable therefor if it is within the scope of the servant's employment[9] or power to bind the master in a tort.[10]

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[1]Williams v. Hendricks, 115 Ala. 277, 22 So. 439 (1897); Commonwealth v. Sacks, 214 Mass. 72, 100 N.E. 1019 (1913).

[2]35 Am. Jur., Master & Servant, § 603.

[3]DeZarn v. Commonwealth, 195 Ky. 686, 243 S.W. 921 (1922); Alden Mills v. Pendergraft, 149 Miss. 595, 115 So. 713 (1928).

[4]Carter Truck Line v. Gibson, 195 Ark. 994, 115 S.W.2d 270 (1938).

[5]Central Foundry Co. v. Laird, 189 Ala. 584, 66 So. 571 (1914); S. & W. Construction Co. v. Bugge, 194 Miss. 822. 13 So.2d 645 (1943).

[6]Mann v. Townsley, 99 Okl. 220, 226 Pac. 554 (1924); Pascher v. United States, 70 F.2d 491 (7th Cir. 1934); 22 C.J.S., Criminal Law, § 84.

[7]Slaughter v. Holsombeck, 166 Miss. 643, 147 So. 318 (1933).

[8]Wright v. Starr, 42 Nev. 441, 179 Pac. 877 (1919); Mecham, Law of Agency, § 499 (3rd. Ed. 1923).

[9]For a "yardstick of measurement" of scope of employment, see: Restatement of Agency, § 229 (1933).

[10]Commonwealth v. Briant or O'Brine, 142 Mass. 463, 8 N.E. 338 (1886).

The imposition of civil liability upon the master for criminal acts committed by servants, without knowledge of the master, can only be justified as a stringent measure to compel such persons to see to it at their peril that the prohibited acts are not committed by servants under the general control of the master.[11] The doctrine of *respondeat superior* has its basis in the fact that the master has the right to supervise and direct the performance of the work done by his servant in all its details, and this right carries with it the correlative obligation to see that no torts shall be committed by the servant in the course of the performance of the character of work for which the servant was appointed.[12] The explanation for this harsh rule of vicarious civil liability for criminal action in the instant case may have its inception in the protection of the public by the judiciary in its application of strict liability in regard to carriers. Courts have often imposed upon carriers an implied duty to furnish their passengers with protection during the journey, and it has been held that the carrier cannot exonerate itself from liability for the acts of its servant[13] committed outside the scope of employment.[14]

The nature, character and purpose of the business involved should be considered in establishing the connecting link between the master and the criminal conduct of his servant.[15] Likewise, it should be proved that the servant was motivated in part at least by the desire to serve his employer,[16] or that the act was not an extreme deviation from the normal conduct of such servants.[17] The essential question in determining civil liability for criminal actions is that of ascertaining whether the wrongful conduct of the servant, at the time, was reasonably within the scope of employment in order to fix, with any finality, the master's liability.

Millard Mundell Bush, Jr.

Constitutional Law—Church and State

Pursuant to a Mississippi statute,[1] the Mississippi Commission on Hospital Care approved a grant of state funds to plaintiff sectarian hospital. In consideration of this grant, the hospital obligated itself to maintain at least 10% of its bed capacity, if needed, for charity patients as provided for by the legislature. Defendant, the State Auditor, refused to accept the Commission's requisition, on the ground that the statute violated the provisions of the Mississippi constitution.[2] Held: The

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[11]State v. Kittelle, 110 N.C. 560, 15 S.E. 103 (1892).

[12]Irwin v. Klein, 271 N.Y. 477, 3 N.E.2d 601 (1936); White's Lumber & Supply Co. v. Collins, 186 Miss. 659, 191 So. 105, *suggestion of error overruled* 186 Miss. 659, 192 So. 312 (1939).

[13]Garvick v. Burlington, C.R. & M. Ry., 131 Iowa 415, 108 N.W. 327 (1906).

[14]Marks v. Alaska S.S. Co., 71 Wash. 167, 127 Pac. 1101 (1912); 3 Thompson on Negligence, § 314 (1914).

[15]Alden Mills v. Pendergraft, *supra* note 3.

[16]Note, 1 Okla. L. Rev. 52 (1948).

[17]Tiffany on Agency § 38. (2nd. Ed. 1924).

[1]Miss. Laws 1948, c. 430. This act provides, among other things, that grants of aid shall be made to those non-profit institutions owned and operated by a corporation or association no part of the net earnings of which inures, or may lawfully inure, to the benefit of any private shareholder, group or individual.

[2]Miss. Const. § 66 provides: "No law granting a donation or gratuity in favor of any person or object shall be enacted except by the concurrence of two-thirds of the members elect of each branch of the legislature, nor by any vote for a sectarian purpose or use."

statute and the grant are valid as a constitutional appropriation of state funds.[3] *Craig v. Mercy Hospital—Street Memorial,* 45 So.2d 809 (Miss. 1950).

A gift of public funds to a private corporation will nearly always be ruled unconstitutional, whether made directly or indirectly.[4] However, grants or appropriations made by the legislature to corporations in consideration of services rendered or to be rendered to the state, or even in consideration of a moral obligation, have been held to be constitutional,[5] although a moral obligation will not sustain an appropriation unless such appropriation be in furtherance of some public purpose.[6] The statute in the instant case is clearly one which bears a reasonable relation to a governmental purpose as expressed in the Constitution.[7]

The gift which a state is prohibited from making to an association is a gratuitous transfer of property of the state voluntarily and without consideration.[8] The Oklahoma court has held that as long as the contract between the state and the sectarian institution involves the element of substantial return to the state in discharge of an obligation and does not amount to a gift, donation or appropriation having no relevancy to the affairs of state, the contract is valid, notwithstanding the sectarian affiliation.[9]

The vital point in all such appropriations seems to be whether the purpose is public,[10] in order to uphold constitutional sanctions and prevent a gratuitous subsidy. In a recent Tennessee case,[11] the court held that "the grant does not constitute a gratuity or donation of state credit as forbidden by the constitution[12] because, under the state act this constitutes the performance of public duties with no right to reap individual profits."

If the purpose of the expenditure of state funds is public, some decisions make it irrelevant whether the agency through which the funds are dispersed is public or not,[13] the test being not who receives the money, but the character or use for which it is expended.[14] This is true even though, incidental to the main purpose, there results an advantage to individuals.[15]

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[3]Hall, Jr., dissenting on the ground that a contribution of public funds to a sectarian institution cannot be justified merely because it was in furtherance or aid of an obligation which the state owed its citizens, and this is true regardless of whether there is or is not a consideration furnished for the funds so used, the allocation remaining a contribution even though there may be value received therefor.

[4]*In re* Voorhee's Estate, 123 N. J. Eq. 142, 196 Atl. 365 (1938).

[5]*In re* Voorhee's Estate, *supra* note 4.

[6]State v. Parsons, 58 Ida. 787, 80 P.2d 20 (1938).

[7]Craig v. North Mississippi Community Hospital, 206 Miss. 11, 30 So.2d 523 (1949), citing Miss. Const. § 86, which provides: "The legislature may provide for the care of the indigent sick in the hospitals in the state."

[8]Children's Home and Welfare Association v. Childers, 171 P.2d 613, (Okla. 1946).

[9]Murrow Indian Orphans Home v. Childers, 171 P.2d 600 (Okla. 1946).

[10]Sacramento-Yalo Port District v. Rodda, 204 P.2d 373 (Calif. 1949).

[11]Bedford County Hospital v. Browning, 225 S.W.2d 41 (Tenn. 1949).

[12]Tenn. Const. Art. II, § 31.

[13]Hager v. Kentucky Children's Home Society, 119 Ky. 235, 83 S. W. 605 (1904).

[14]Kentucky Building Commission v. Effron, 310 Ky. 355, 220 S.W.2d 836, 838; Craig v. North Mississippi Community Hospital, *supra* note 7.

[15]Patrick v. Riley, 209 Cal 350, 287 Pac. 455 (1930); Murrow Indian Orphans Home v. Childers, *supra* note 9.

On the other hand, by limiting the words "sectarian purpose" to their meaning in a popular sense, an appropriation to a sectarian institution has been held void, even though used in part only for sectarian purposes, since it is impossible to separate the legitimate use from that which is forbidden.[16]

Payments of state funds even to admittedly sectarian institutions have been approved in recent cases on the ground that "aid" means a gratuity, and where the appropriation was actually less than the cost of the service rendered, the transaction was upheld. Such a decision is based on the ground that the appropriation was not for the agency itself, but for the function which it serves. Thus, it is proper for the legislature to employ a private agent to perform its duties where the legislature does not possess facilities of its own to do so.[17] Where an orphanage furnished services to children valued at more than the state contribution, the court upheld the contention that the state was not aiding the institution.[18] However, this argument postulates that the constitutional prohibitions are directed not at the danger of inter-control of church and state, but only at the danger of the public purse being overcharged. Even when private institutions are performing services which would otherwise fall upon the state, any assistance from the state is more like a gift than a *quid pro quo* where the benefit of the public is a necessary result of the performance of the private institution.[19]

The United States Supreme Court has twice avoided a square holding on the religious issue.[20] It found a Catholic-owned and operated hospital in the District of Columbia to be non-sectarian on the ground that a corporation cannot belong to a religious sect.[21] Subsequently, the court approved the disputed fiction that free books for parochial pupils are for the benefit of the pupils, and of resulting benefit to the state, and are not an aid to the school.[22] Both Mississippi and Louisiana adhered to this latter doctrine.[23]

In still another case before the United States Supreme Court testing the Federal Constitution's inhibitions on governmental aid to religion, the court did little more than render an opinion on the particular facts, with little indication of why that decision was chosen or on what grounds future decisions would be placed.[24]

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[16]State v. Hallock, 16 Nev. 373 (1882).

[17]Dunn v. Chicago Industrial School, 280 Ill. 613, 117 N.E. 735 (1917); Hager v. Kentucky Children's Home Society, *supra* note 13.

[18]Murrow Indian Orphans Home v. Childers, *supra* note 9. *Contra*: State v. Hallock, *supra* note 16.

[19]Cook County v. Chicago Industrial School for Girls, 125 Ill. 540, 18 N.E. 183 (1888).

[20]For further discussion, see Note, *Catholic Schools and Public Money*, 50 YALE L. J. 917 (1940-41).

[21]Bradfield v. Roberts, 175 U.S. 291 (1899).

[22]Cochran v. Louisiana State Board of Education, 281 U.S. 370 (1930).

[23]Chance v. Mississippi State Textbook Rating and Purchasing Board, 190 Miss. 453, 200 So. 706 (1941); Borden v. Louisiana State Board of Education, 168 La. 1005, 123 So. 655 (1929). *Contra*: Dakota Synod v. State, 2 S.D. 366, 50 N.W. 632 (1891).

[24]Note, *Public Funds for Sectarian Schools*, 60 HARV. L. REV. 793 (1946), citing Everson v. Board of Education, 330 U.S. 1 (1947), wherein the court held that although the First Amendment has erected a wall between church and state, which must be kept high and impregnable, yet the power of the United States Supreme Court to strike down state statutes authorizing expenditure of public money on the ground that the purpose of such expenditure is not a public one must be exercised with the most extreme caution, lest a state's power to legislate for the public welfare be seriously curtailed.

The trend of the courts today, particularly the state tribunals, seems to be indicative of an increasing tendency toward liberal construction of constitutional prohibitions, with respect to the allocation of public funds. The decision in the principal case clearly indicates that the only constitutional prohibitions capable of withstanding this onslaught are those explicit in their prohibitory construction.[25]

William F. Dukes

Injunctions—Enjoining Resident Citizens From Filing Suit Against Nonresident Corporation in the State of its Domicile

Complainant, a nonresident corporation domiciled in Delaware, sought an injunction restraining the defendant, a citizen of Mississippi, from filing a transitory tort action against complainant in the state of its domicile. The alleged tort action arose in Mississippi where complainant was duly qualified and was doing business. Held: A resident citizen may be enjoined from filing suit against a nonresident corporation in the state of its domicile, in the absence of a federal statute controlling venue. *Poole v. Mississippi Publishers Corporation,* 44 So.2d 467 (Miss. 1950).

It is a general rule[1] that an equity court may under proper circumstances[2] enjoin one of its own citizens[3] from prosecuting an action in another state. However, it is sometimes stated as an exception to this rule that such injunction will not be granted in favor of a nonresident.[4] In the instant case, the Mississippi Court, in granting the relief to a nonresident, has aligned itself with the minority.[5]

The principle underlying the issuance of such an injunction is that the parties should litigate in the state of their common residence.[6] As a corollary to this principle, some courts have denied the injunction when one of the parties was a nonresident, since the state in which the injunction was sought lacked the power

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[25]Suggestion of error as to the principal case overruled on October 2, 1950, despite a vigorous dissent. Craig v. Mercy Hospital-Street Memorial, 47 So.2d 867 (Miss. 1950).

[1]Joyce, Injunctions § 606 (1909); Griffith, Mississippi Chancery Practice § 438a (2nd. Ed. 1950).

[2]As to the circumstances under which the injunction will be granted, see Note, 115 A.L.R. 237 (1937); 28 Am. Jur., Injunctions § § 210-214. Such injunction was held not violative of the full faith and credit and the privileges and immunities clauses of the constitution in Cole v. Cunningham, 133 U.S. 107 (1889).

[3]Attempts to enjoin nonresidents have been denied since the court is powerless to enforce the injunction. Greer v. Cook, 88 Ark. 93, 113 S.W. 1009 (1908); Carpenter v. Hanes, 162 N.C. 46, 77 S.E. 1101 (1913).

[4]Folkes v. Central of Georgia Ry., 202 Ala. 376, 80 So. 458 (1918); Missouri Pacific Ry. v. Harden, 158 La. 889, 105 So. 2 (1925); Bigelow v. Old Dominion Copper Mining & Smelting Co., 74 N.J. 457, 71 Atl. 153 (1908); American Express Co. v. Fox, 135 Tenn. 489, 187 S.W. 1117 (1916); Wehrbane v. Peyton, 134 Conn. 486, 58 A.2d 698 (1948). Some courts which deny relief to a nonresident grant the injunction where two parties, one a resident the other a nonresident, seek the injunction. Rader v. Stubblefield, 43 Wash. 334, 86 Pac. 560 (1906); McWorter v. Williams, 228 Ala. 607, 155 So. 309 (1934).

[5]Danzie v. Metropolitan Life Ins. Co., 23 N.Y.S.2d 733 (1940).

[6]Hartford Accident & Indemnity Co. v. Bernblum, 122 Conn. 583, 191 Atl. 542 (1937).

to compel the nonresident to submit to that jurisdiction.[7] Thus the relief has been refused a nonresident corporation, where, if the injunction had been granted and the defendant had filed suit in a state court of the forum, the corporation had the right, by reason of diverse citizenship, to remove the suit to federal court.[8]

In the states which deny relief to a nonresident, the decisions appear inconsistent; however, they may be reconciled by a jurisdictional interpretation of the word "resident." If a party is subject to the suit in the state court of the forum, without the right of removal to federal court, the injunction is granted; otherwise, the relief is denied. It would appear therefore, that in order to obtain this injunction, a foreign corporation must fall within one of two groups. It must either show that it has become reincorporated under the laws of the forum,[9] or that a federal statute prevents removal from state to federal court.[10] One court has granted the injunction where the foreign corporation had been domesticated;[11] however, neither domestication[12] nor a license to do business[13] prevent removal to the federal courts.

The instant case has the practical effect of depriving defendant of the right to litigate his suit in a state court. The injunction prohibits bringing the suit in the state courts of Delaware,[14] and the right of a nonresident corporation to have the case removed to federal court limits the use of the Mississippi courts.[15] Since any exercise of this power necessarily limits the fundamental right of a party to litigate anywhere his opponent may be found, it would seem proper to restrict this injunctive relief to those who may be compelled to submit to the same suit in the state courts of the forum.[16]

John Dulaney, Jr.

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[7]Folkes v. Central of Georgia Ry. *supra* note 4; Missouri Pacific Ry. Co. v. Harden, *supra* note 4.

[8]American Express Co. v. Fox, *supra* note 4.

[9]Memphis & C. Ry. v. Alabama, 107 U.S. 581 (1883); Town of Bethel v. Atlantic Coast Ry. 81 F.2d 60 (4th Cir. 1936).

[10]In Baltimore & Ohio Ry. v. Kepner, 314 U.S. 44 (1941), and Miles v. Illinois Central Ry., 315 U.S. 698 (1942), the U.S. Supreme Court held a state court could not enjoin one of its own citizens from prosecuting under the Federal Employers Liability Act in a distant state. Prior to these decisions, some state courts enjoined their citizens from prosecuting a nonresident railroad corporation in a remote jurisdiction since the act provided that state courts had concurrent jurisdiction and the corporation was precluded from removing the suit to federal court. 36 Stat. 1167 (1939), 45 U.S.C. § 56 (1946); Alford v. Wabash Ry., 229 Mo. App. 102, 73 S.W. 277 (1934); Louisville & Nashville Ry. v. Ragan, 172 Tenn. 493, 113 S.W.2d 743 (1938).

[11]Northern Pacific Ry. v. Richey & Gilbert Co., 132 Wash. 526, 232 Pac. 355 (1925).

[12]Foy & Shemwell v. Georgia-Alabama Power Co., 298 F. 643, (S.D. Ga. 1924); Southern Ry. v. Query. 21 F.2d 333 (E.D.S.C. 1927).

[13]Martin's Administrator v. Baltimore & Ohio Ry., 151 U.S. 673 (1894); Gorgone v. Maryland Casualty Co., 32 F. Supp. 150 (E.D. Pa. 1940).

[14]In the instant case, had suit been filed in a state court of Delaware, complainant could not have removed the case to federal court on the ground of diverse citizenship since the present act provides that the right of removal lies only in favor of a defendant who is not a resident of the state wherein the action was brought. 62 Stat. 937, 28 U.S.C. § 1441 (1948).

[15]Gorgone v. Maryland Casualty Co., *supra* note 13.

[16]The court in the *Poole* case did not consider this result, but granted the injunction on the ground that it was necessary to prevent fraud, inconvenience, and undue hardship.

Labor Law—Peaceful Picketing as Free Speech

Hanke, a business owner without employees, sought and obtained an injunction from the courts of the State of Washington to prohibit the peaceful picketing of his business by a labor union, the object of the picketing being to force Hanke to become a union shop and to limit his working hours. On certiorari, the United State Supreme Court held that the constitutional guaranty of freedom of speech is not infringed by the common law policy of a state prohibiting peaceful picketing by a labor union of "self employer" shop. *International Brotherhood of Teamsters, Chauffeurs, Warehousemen, and Helpers' Union, Local 309 v. Hanke,* 70 Sup. Ct. 773 (1950).

The original classification of picketing into a category to be protected under the first and fourteenth amendments was more the result of accident than deliberate characterization. In *Senn v. Tile Layers' Union*[1] the State of Wisconsin had seen fit to permit peaceful picketing through statutory enactment. The United States Supreme Court found that since Wisconsin had chosen to place peaceful picketing on a par with "publications in the press," there was no reason to treat such picketing as though it were anything other than an exercise of free speech in that instance.

In *Thornhill v. Alabama,*[2] however, the Court cited the *Senn* case for the proposition that the fourteenth amendment required picketing to be put on a par with free speech, and thereby the *Thornhill* case became the landmark for all subsequent cases involving an attempted restraint on peaceful picketing.

It has become well established that the protection given to the exercise of picketing by the first and fourteenth amendments will not be extended to situations where there is an abuse of that right. Such abuses have been found to exist where there was violence in the picketing,[3] or where the picketing, though peaceful, was found to be "enmeshed" in a "pattern of violence."[4] Instances where picketing has been used to force an employer to violate the law of the state to which a criminal sanction has been attached have also been denied protection.[5]

Interpretation of the *Thornhill* case to mean that protection would extend to peaceful picketing, if used to "communicate the facts of a *labor dispute,*" resulted in attempts by states to define "labor dispute" so narrowly that peaceful picketing could be prohibited where there was no employer-employee relationship involved between those picketed and the persons picketing. As the cases[6] indicate, these attempts resulted in failure. It was not indicated in these cases whether the same result would have been reached had the state court declared that the picketing was for a purpose

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[1]301 U.S. 486 (1936).

[2]310 U.S. 88 (1940). Here a statute of Alabama made it unlawful to publicise the facts of a labor dispute by picketing, pamphlet, or otherwise "without just cause or legal excuse." Held: Statute invalid on its face. The principle was reasserted in Carlson v. California, 310 U.S. 106 (1940).

[3]Hotel and Restaurant Employees' International Alliance, Local No. 122 v. Wisconsin, 315 U.S. 427 (1941).

[4]Milk Wagon Drivers Union of Chicago, Local 753, v. Meadowmoor Dairies, 312 U.S. 287 (1940).

[5]Giboney v. Empire Storage & Ice Co., 336 U.S. 490 (1948).

[6]American Federation of Labor v. Swing, 312 U.S. 321 (1940); Bakery and Pastry Drivers & Helpers, Local 802 v. Wohl, 315 U.S. 769 (1941); Cafeteria Employees Union, Local 302 v. Angelos, 320 U.S. 293 (1943).

unlawful as against the public policy of the state. It is submitted that perhaps a different outcome would have developed had such "unlawful purposes" been clearly defined by the state court, and had the policy considerations on which the prohibition was founded been brought to the attention of the Supreme Court.

This contention is pointed up by the results that were reached when the picketing was declared to be in fact for a purpose unlawful under the public policy of the state, whether declared by the legislature expressly,[7] or by the state court.[8]

Out of the cases which have been handed down since *Thornhill v. Alabama,* one point appears to be clear. Peaceful picketing is no longer considered the equivalent of free speech. The Supreme Court has recognized that although there is an element of communication in picketing to which protection will be afforded, the coercive effects which are inherent in every exercise of the picket line inject factors which make picketing more than an ordinary means of communication. As such, it may be more amenable to control by a state, if the state declares that a given exercise of the right to picket has resulted in a situation unlawful as against its public policy.

This may explain the absence in peaceful picketing cases of the application of the "clear and present danger test" to which the court has consistently subjected "pure" free speech situations.[9]

It therefore appears that peaceful picketing may be prohibited, despite the presence of the communication element, if a state can satisfy the Supreme Court that having weighted the socio-economic factors within its borders, it has found that a particular exercise of peaceful picketing will result in a violation of its public policy as declared either by its legislature or by its highest court.

Norman B. Gillis, Jr.

Oil and Gas—Quantitative Method of Assessment of Lessor's Non-Producing Interest

Defendant was owner of a one-half undivided interest in minerals subject to a lease. The leasehold estate was assessed to the lessee who paid taxes under that assessment. The land was otherwise assessed to the surface owner by a general sectional description, and he paid taxes under that assessment. No separate assessment had been made of the defendant's mineral interest under lease. The state tax collector later back-assessed the defendant's mineral interest on the basis of one-half of all the minerals under the tract. The circuit court allowed an assessment of only one-half of the total royalty in the minerals, thus reducing the per acre assessment to one-sixteenth of the total acreage. Held: The original quantitative

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[7]Building Service Employees Union v. Gazzam, 70 Sup. Ct. 784 (1950). Thus the *Hanke* case and *Gazzam* are companion cases, being decided on the same day.

[8]Hughes v. Superior Court of California, 70 Sup. Ct. 718 (1950); Automobile Drivers and Demonstrations Local Union No. 882 v. Cline, 70 Sup. Ct. 773 (1950). The facts of the *Cline* case were so similar to those in the *Hanke* decision, that both cases were disposed of in the same opinion.

[9]See Palko v. Connecticut, 302 U.S. 319 (1937); Schenk v. United States, 249 U.S. 47 (1919); Gitlow v. New York, 286 U.S. 642 (1925); Cox v. New Hampshire, 312 U.S. 574 (1940).

assessment was correct, because the defendant had more than a simple royalty. It owned the minerals, subject to lease, which included royalty, rentals, possibility of reverter, and right to convey these interests. *Bailey v. Federal Land Bank,* 43 So.2d 375 (Miss. 1949).

This case eliminates another problem of assessment of minerals in Mississippi by determining the quantity of a mineral estate with which a lessor of a non-producing mineral interest is assessable for ad valorem taxes.

In the early stages of the state's oil and gas law, the Mississippi court held that minerals in place were not taxable,[1] and that an attempted assessment against a non-producing one-eighth royalty interest was invalid because taxes on it were paid by the surface owner of the land or the lessee of the minerals.[2] The apparent effect of another decision was to make an assessment to the surface owner include the under-surface estate not separately assessed and, consequently, to preclude any assessment on the later, unless an exception of it was made in the surface owner's assessment.[3]

Later the court required separate assessment of fractional interests[4] on both producing[5] and non-producing[6] mineral estates. The court had reversed its earlier opinion that such minerals in place were not taxable.[7]

In a previous appeal of the instant case the court had overruled its earlier decision that a non-producing royalty interest was not taxable, and made it clear that such is a taxable property interest.[8] This removed doubt as to whether minerals in place were taxable and paved the way for the determination of the extent of its assessment. In the instant case the court determined the quantitative method of assessing a lessor's non-producing estate. He is not taxable solely on the quantity of his royalty, but upon his whole mineral estate under lease, consisting of annual rentals, possibility of reverter, the royalty interest, and the right to convey these interests.

Royalty[9] and rentals[10] are definitely subjects of a property tax. But a possibility of reverter is a none-possessory interest in property, a mere expectation,[11] and as such, the logic of taxing it as property is debatable. Similarly there appears to be no property in a right to convey, such being a mere privilege attached to property. Thus, the only actual property added to the assessment of the one-sixteenth royalty in broadening it to include the lessor's entire one-half of the mineral estate under lease was the rental income on the lease. No other court or text writer has gone so far as to include more than the royalty and rentals in the quantitative measure-

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[1]Gulf Refining Co. v. Stone, 194 Miss. 713, 21 So.2d 19 (1945).
[2]Supervisors of Simpson County v. Smith County Oil Co., 200 Miss. 18, 25 So.2d 457 (1946).
[3]Stern v. Parker, 200 Miss. 27, 25 So.2d 787 (1946).
[4]Hendrix v. Foote, 36 So.2d 145 (1948); *suggestion of error sustained in* 205 Miss. 1, 38 So.2d 111 (1948).
[5]State v. Cummings, 206 Miss. 630, 40 So.2d 587 (1949).
[6]McNatt v. Hyman, 204 Miss. 824, 30 So.2d 161, 38 So.2d 107 (1948), *suggestion of error sustained* in latter hearing.
[7]*Supra,* notes 5 and 6.
[8]Bailey v. Federal Land Bank, 206 Miss. 357, 40 So.2d 173 (1949).
[9]Sheffield v. Hoag, 77 S.W.2d 1021 (Tex. Civ. App. 1931).
[10]State v. Royal Mineral Ass'n., 132 Minn. 232, 156 N.W. 128 (1916).
[11]RESTATEMENT, PROPERTY, § 25 (1932), proposes this classification of a possibility of reverter.

ment of a lessor's non-producing mineral estate.[12] While the instant construction given this Mississippi tax statute[13] is feasible, its soundness is questionable in view of the failure of courts and text writers long familiar with oil and gas problems to adopt it in construing similar statutes and in view of the quantitative measurement including a mere privilege and expectation as subjects of ad valorem taxes.[14]

Ellis Griffith.

Oil and Gas—Unless Clause—Equitable Relief From Termination for Failure to Make Delay Rental Payment on Time

Plaintiff was defendant's lessee under an "unless" oil and gas lease which contained the following provision: "If no well be commenced . . . on or before the 4th day of October, 1947, the lease shall terminate as to both parties, unless the lessee on or before that date shall pay or tender to the lessor, . . . the sum of Forty and No/100 Dollars . . . ." Because of an inadvertent error of plaintiff's employee, the 1948 rental was not tendered until December, whereupon it was refused by defendants. Plaintiff brought action to quiet title to the lease. Held: Lessee is not entitled to equitable relief from the termination of a lease by reason of failure to pay the delay rental within the time specified, where the failure, although unintentional, was caused by a mistake of an employee or agent of the lessee in the performance of his duties, acting under the direction, supervision and control of the lessee. *Phillips Petroleum Company v. Curtis,* 182 F.2d 122 (10th Cir. 1950).

The courts have consistently held, since the decision of *Glasgow v. Chartiers Gas Company,*[1] that the unless form of lease terminates automatically upon the failure of the lessee to either drill or pay within the stipulated time.[2] There is no duty on the lessee to pay the delay rental,[3] and consequently the lessor cannot recover against him for failure to make such payment.[4]

Although the courts sometimes refer to the termination of the unless lease as a forfeiture, the unless clause is not a fortfeiture provision.[5] It is a limitation upon

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[12]*Supra,* note 9; 8 Summers, Oil & Gas § § 797, 781-799 (2nd Ed. 1939); Thuss, Texas Oil & Gas § 315 (2nd Ed. 1935).

[13]Miss. Code § 9770 (1942).

[14]The importance of this case is limited by the Documentary Stamp Tax Act, Miss. Laws 1946, c. 409, which exempts from ad valorem taxes all non-producing leasehold mineral interests and other interests in mineral estates created after its effective date, Jan. 1, 1947. Also owners of similar estates already of record may obtain exemption by applying for it and paying the stamp tax.

[1]152 Pa. 48, 25 Atl. 232 (1892).

[2]Empire Gas and Fuel Co. v. Saunders, 22 F.2d 733 (5th Cir. 1927); Keeler v. Dunbar, 37 F.2d 868 (5th Cir. 1930); Union Oil and Gas Co. v. Wiedemann Oil Co., 211 Ky. 361, 277 S.W. 323 (1925); Berthelote v. Loy Oil Co., 95 Mont. 434, 28 P.2d 187 (1934); New England Oil and Pipe Line Co. v. Rogers, 154 Okla., 285, 7 P.2d 638 (1931); W. T. Waggoner Estate v. Sigler Oil Co. 118 Tex. 509, 19 S.W. 2d 27 (1929); Humble Oil Refining Co. v. Harrison, 146 Tex. 216, 205 S.W.2d 355 (1947).

[3]2 Summers Oil and Gas § 339 (Perm. ed. 1938).

[4]Gloyd v. Midwest Refining Co., 62 F.2d 483 (10th Cir. 1932); Brunson v. Carter Oil Co. 259 Fed. 656 (D.C. 1919); Ford v. Kentucky West Virginia Gas Co.. 299 Ky. 455, 185 S.W.2d 953 (1945); White v. Hunt, 193 Miss. 742, 10 So.2d 539 (1942).

[5]Empire Gas and Fuel Co. v. Saunders, 22 F.2d 733 (5th Cir. 1927); Humble Oil and Refining Co. v. Davis, 296 S.W. 285 (Tex. Civ. 1927).

the term or period of the grant.[6] Upon failure of the lessee to either drill or pay within the specified time, the lease terminates ipso facto without the necessity of re-entry by the lessor.[7]

Since the termination of the unless lease is not regarded as a forfeiture, it follows that the usual equitable principles against forfeitures should not apply.[8] Nevertheless, equitable relief has been afforded by many courts where the failure to make payment on time was due to accident or mistake which was not the result of negligence or fault on the part of the lessee.

Where the lessee mails the rental check in ample time to be delivered before the due date, but because of mistake or fault on the part of the Postal Department the payment is not received by the lessor on time, it is held that the unless lease does not terminate.[9] It should be noted that time is of the essence,[10] and the lessee must actually make a good faith attempt to tender timely payment.[11] The application of the doctrine of substantial performance has been refused to prevent the termination of a lease.[12]

Where the lease provides that the payments are to be made to the lessor's depository bank and the bank receives the rental on time but does not place it to the credit of the lessor before the stipulated time, many courts hold that the lease does not terminate.[13]

In situations where timely payment is not made due to an act of the lessor to which the lessee is not a party, it is held that there is no termination of the lease. Thus, in *Humble Oil and Refining Company v. Harrison*,[14] the lessor was estopped to assert termination where the payment was made to the wrong party due to the lessee's misconstruction of an ambiguous mineral deed to which the lessee was not a party.

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[6]Humble Oil and Refining Co. v. Davis, *supra* note 5; W. T. Waggoner Estate v. Sigler Oil Co., *supra* note 2; 2 SUMMERS OIL AND GAS § 337 (Perm. ed. 1938).

[7]Keeler v. Dunbar, *supra* note 2; W. T. Waggoner Estate v. Sigler Oil Co., *supra* note 2; 2 SUMMERS OIL AND GAS § 452 (Perm. ed. 1938).

[8]Stady v. Texas Co., 150 Kan. 420, 94 P.2d 322 (1932); Williams v Ware, 167 Okla. 626, 31 P.2d 567 (1934); Garfield Oil Co. v. Champlin, 78 Okla. 91, 189 Pac. 514 (1920).

[9]National Refining Co. v. Wagner, 169 F.2d 43 (10th Cir. 1948); Gloyd v. Midwest Refining Co., 62 F.2d 483 (10th Cir. 1933); Harvey v. Benmo Oil Co., 272 Fed. 475 (D.C. 1921); Brunson v. Carter Oil Co., 259 Fed. 656 (D.C. 1919); Young v. Moncrief, 117 Kan. 698, 232 Pac. 871 (1925); Kays v. Little, 103 Kan. 461, 175 Pac. 149 (1918); Oldfield v. Gypsy Oil and Gas Co., 123 Okla. 292, 253 Pac. 298 (1926). *Contra:* Keeler v. Dunbar, 37 F.2d 868 (5th Cir. 1930) (Rental sent by telegraph not delivered in time due to negligence of telegraph company); Appling v. Morrison, 227 S.W. 708 (Tex. Civ. 1921). See 2 SUMMERS OIL AND GAS § 344 (Perm. ed. 1938).

[10]Garfield Oil Co. v. Champlin, 78 Okla. 91, 189 Pac. 515 (1920).

[11]Gasaway v. Teichgraeber, 107 Kan. 340, 191 Pac. 282 (1920).

[12]Gasaway v. Teichgraeber, *supra* note 11; Bailey v. Williams, 223 S.W. 311 (Tex. Civ. 1920).

[13]Beatty Oil and Gas Co. v. Blanton, 245 Fed. 979 (D.C. 1917); Armstrong v. McGough, 157 Ark. 173, 247 S.W. 790 (1923); Gulf Refining Co. v. Bagby, 200 La. 258, 7 So.2d 903 (1942); Brazell v. Soucek, 130 Okla. 204, 266 Pac. 442 (1928); Gulf Production Co. v. Perry, 51 S.W.2d 357 (Tex. Civ. 1932); 2 SUMMERS OIL AND GAS § 343 (Perm. ed. 1938).

[14]146 Tex. 216, 205 S.W.2d 355 (1947). See also Kouns v. Southwood Oil Co., 203 Ark. 469, 158 S.W.2d 37 (1942); Farrow v. Caudill, 199 Ky. 290, 250 S.W. 989 (1923).

In *Hughes v. Franklin*,[15] the Mississippi Supreme Court held that the date shown on the lease itself is the dominant date rather than the date of delivery. Payment not having been made on or before the date shown on the lease, a termination was effected. The same court held in *Love Petroleum Company v. Atlantic Oil Producing Company*[16] that where the lease designates the month but leaves the particular date for payment blank, the lessee has the right to pay the rental on any day of the month specified.

The precise question of the application of equitable relief in case of late payment has not been decided in Mississippi. In the instant case, the Oklahoma court has stated a good rule. It is submitted that where the lessee makes a good faith attempt to make timely payment but such is not accomplished due to an unavoidable mistake or accident beyond the control of the lessee and not resulting from fault or negligence of the lessee or his employees, equitable relief should be granted.

Joe R. Fancher, Jr.

WILLS—JOINT—INVALIDITY OF INSTRUMENT TO BECOME EFFECTIVE ONLY UPON DEATH OF SURVIVOR

Complainants, heirs at law of the deceased parents of the defendants, brought suit for partition of lands owned by the father. Defendants claim property under testamentary instruments executed by both parents and not to become effective until the death of the survivor. HELD: The instruments were invalid as a will because they were ambulatory after the death of the maker first to die. *Palmer v. Riggs*, 46 So.2d 86 (Miss. 1950).[1]

When first introduced, joint wills were held invalid in both England and the United States.[2] There is, however, an understandable desire on the part of the courts to carry out the intentions of the makers of such instruments. Therefore, joint wills are held valid if they can be probated on the death of each maker as the will of that maker.[3]

Even with this concession, there is still the problem of what to do with an instrument not meant to take effect until the deaths of both makers. The decision in the instant case is in agreement with the majority of authority construing such instruments.[4] There is, however, some authority to the contrary.[5]

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[15]201 Miss. 215, 29 So.2d 79 (1947).

[16]169 Miss. 259, 152 So. 829 (1934).

[1]It is interesting to note the earlier decision holding the instruments construed in the present case unenforceable as deeds because of their testimentary character. Palmer v. Riggs, 197 Miss. 256. 19 So.2d 807 (1944).

[2]ATKINSON, WILLS § 69, 70 (1937).

[3]Evans v. Smith, 26 Ga. 98 (1859); Couch v. Wood, 156 Ga. 626, 119 S.E. 691 (1923).

[4]Epperson v. White, 156 Tenn. 155, 299 S.W. 812, 815, (1927); Hershey v. Clark, 35 Ark. 17, (1879); State Bank v. Bliss, 67 Conn. 317, 35 Atl. 255 (1896); Walker 14 Ohio St. 157 (1862); "The wills statutes do not confer power to dispose of property by an instrument to remain suspended and in abeyance for an indefinite period of time after a testator's death." Comment, 15 TENN. L. REV. 728 (1937-39).

[5]"A joint will which by its terms is not to be probated until after the death of both testators is not on that account invalid." Schumaker v. Schmidt, 44 Ala. 454 (1870).

The instruments construed in the present case are extreme examples of a joint will, which the courts will not enforce. As the instruments move away from this extreme they again become enforceable. Thus, an instrument executed by a husband and wife as a joint will concerning property owned by the husband alone has been allowed effect as the separate will of the husband, the wife being a mere cipher in the transaction.[6] Also, "Where the property is owned jointly and vests in the survivor, the fact that the will speaks from the death of the survivor will not invalidate it."[7]

The rule in the instant case pertains to instruments that are to have no effect until the death of the survivor. This rule should not be confused with the rule as to instruments containing the provision that the property shall be divided upon the death of the survivor if the intention of the testators or provisions in the instrument indicate that the instrument was to be probabted at the death of one of the testators. Such instruments are allowed probate on the death of one of the testators notwithstanding that the division must await the death of the survivor.[8] This has been held to be the rule not only where the intention of the testators or provisions of the instrument indicated that the instrument should be probated on he death of one of the testators, but also where the instrument did not specifically provide that probate was to await the death of the survivor.[9] Such provisions are construed as creating an estate to commence in futuro and are not held to render the instrument ineffective prior to the death of the testator last surviving.[10] As stated in the instant case, the instruments therein construed, "expressly exclude the power to deliver them up for probate upon the death of the first testator."

The Mississippi Supreme Court has previously decided that a jointly executed will must take effect as the separate will of each testator.[11] This opinion seems to be in accord with the instant case.

Harris B. Henley.

Wills—Letters as Holographic Will—Subscription At End Thereof

Proponents undertook to probate as a will a letter in the handwriting of deceased. It expressed a desire to give an interest in land to the addressee, with no provision as to when such interest was to pass, but rather an indication that subsequent action was to follow. The letter was signed by deceased, but was followed by a post script under which there was no signature, providing in effect that, "(I)f I die, you have this letter to prove your ownership . . . ." Held: Since the post script was not *subscribed* as required by the Mississippi statute,[1] it could not be given

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[6]Rogers, Appellant, 11 Me. 303 (1834); Allen v. Allen, 28 Kan. 18 (1882); Chang v. Home, Frontier & Foreign Missionary Soc., 28 Ill. App. 621 (1888); Graham v. Graham, 297 Mo. 290, 249 S.W. 37 (1923); *Re* Hasen, 87 Neb. 567, 127 N.W. 879 (1910); Cole v. Shelton, 169 Ark. 695, 276 S.W. 993, (1925).

[7] Note, 61 Harv L. Rev. 676 (1947-48).

[8]Collins v. Stroup, 71 N.D. 679, 3 N.W.2d 742 (1942); Moore v. Samuelson, 107 Kan. 744, 193 Pac. 369 (1920); 57 Am. Jur. § 683.

[9]Graham v. Graham 297 Mo. 290, 249 S.W. 37 (1923).

[10]Note, 169 A.L.R. 19 (1947); 57 Am. Jur. § 683.

[11]Hill v. Goodwin, 120 Miss. 83, 81 So. 790 (1919).

[1]Miss. Code § 657 (1942). (". . . moreover, if not wholly written and subscribed by himself or herself, . . .")

testamentary effect. The letter proper was merely an indication of a desire to make a testamentary disposition in the future, and it alone could not be probabted as a holographic will. In re *George's Estate,* 45 So.2d 571 (Miss. 1950).

If the required formalities are observed, a letter may operate as a will.[2] To be sustained as ordinary wills, letters must be attested by the required number of witnesses.[3] However, since attesting witnesses are not generally required in the case of holographic wills,[4] the requirements of execution are often met by a letter. Not every letter which speaks of a disposition of the writer's property will be regarded as a will. Testamentary intent must be manifested or the letter will not be given testamentary effect.[5] Letters which provide for the disposition of the writer's property upon his death may amount to a will,[6] as may letters indicating the disposition desired until a formal will is prepared.[7]

In those jurisdictions which have regulated holographic wills by legislation, it is required that the instrument be signed in order to be valid.[8] A few statutes, such as that in Mississippi, require that the will be subscribed, or signed at the end of the instrument.[9] This requires a distinction between sign and subscribe.[10] The

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[2]*In re* Miller's Estate, 54 Ariz. 258, 92 P.2d 335 (1939); Cartwright v. Cartwright, 158 Ark. 278, 250 S.W. 11 (1923); Milam v. Stanley, 33 Ky. 783, 111 S.W. 296 (1908); *In re* Mey's Estate, 200 Miss. 548, 28 So.2d 125 (1947; Hewes v. Hewes, 110 Miss. 826, 71 So. 4 (1916); Buffington v. Thomas, 84 Miss. 157, 36 So. 1039 (1904). For a complete study of letters as wills, see Note, 54 A.L.R. 918 (1928); see also ATKINSON, HANDBOOK ON LAW OF WILLS 162 (1st ed. 1937); See Note, 54 A.L.R. 918 (1928) (". . . the writer has not been able to find even a dictum or casual reference to dispute this almost axiomatic statement.")

[3]ATKINSON, *op. cit. supra* note 2, at 162; Armstrong v. Walton, 105 Miss. 337, 62 So. 173 (1913); Better v. Hirsch, 115 Miss. 614, 76 So. 555 (1917) (These are holographic wills, but are probated as regular wills because of attestation, and could not be probated as holographic wills, because not subscribed.); Orth v. Orth, 145 Ind. 184, 42 N.E. 277, 44 N.E. 17 (1895); Stone v. Stone, 263 Ky. 732, 93 S.W.2d 617 (1936).

[4]Regulated by statute in nineteen jurisdictions, ATKINSON, *op cit. supra* note 2 at 305. Divided into two types: *La. Rule*; Calif., Idaho, Mont., Nev., N.D., Okla., S.D., Utah, Wyo., (Those states which recognize holographic wills as a distinct type.) Bordwell, *Statute Law of Wills,* 14 IA. L. REV. 25 (1928); see also, Comment, 14 CAL. L. REV. 245 (1926); S. D. CODE, § 56.0209 (1939) (defines holographic will as follows: "An holographic will is one that is entirely written, dated and signed by the hand of the testator himself . . . and need not be witnessed."); and the *Va. Rule*; Ariz., Ark., Ky., Miss., N.C., Tenn., Tex., W. Va., (Those states who merely dispense with attestation.) Bordwell *Statute Law of Wills,* MISS. CODE § 657 (1942). (". . . if not wholly written and subscribed . . . it shall be attested.").

[5]Sullivan v. Jones, 130 Miss. 101, 93 So. 353 (1922); Giden v. Giden, 176 Miss. 98, 167 So. 785 (1936); *In re* Kellerher's Estate, 202 Cal. 124, 259 Pac. 437 (1927) (Indicating a disposition at a future time); *In re* Kauffman's Estate, 283 Pa. 375, 129 Atl. 98 (1925); *In re* Ross' Estate, 131 Cal. 635, 22 P.2d 22 (1933).

[6]*In re* Mey's Estate, *supra* note 1; Hewes v. Hewes, *supra* note 1; *In re* Miller, *supra* note 1.

[7]Nelson v. Nelson, 235 Ky. 189, 30 S.W.2d 893 (1930); see Comment, 30 CAL. L. REV. 1217 (1930).

[8]See note 4, *supra.*

[9]PAGE, WILLS § § 369, 370 (2nd ed. 1928); see also Note, 54 A.L.R. 937 (1928). Borchers v. Borchers, 145 Ark. 426, 224 S.W. 720 (1920); Graham v. Edwards, 162 Ky. 771, 173 S.W. 127 (1915); Better v. Hirsch, *supra* note 1; Armstrong v Walton, *supra* note 1; *In re* Baldwin's Estate, 357 Pa. 432, 55 A.2d 263 (1947).

[10]PAGE, WILLS § 288 (2nd ed. 1928); Baker v. Baker, 199 Miss. 388, 24 So.2d 841 (1946); Hoffman v. Hoffman. 370 Ill. 176, 18 N.E. 2d 209 (1939).

majority, however, requires only that the instrument be signed, holding that the place of the signature is immaterial.[11]

A will is occasionally presented for probate in which provisions appear in the space below the signature of the testator.[12] In those states which have regulated holographic wills and provide that the testator must subscribe the will, it is clear that the provisions which follow the signature are invalid.[13] However, there is some conflict of authority as to the validity of the provisions which precede the signature.[14] If the probate of such will is resisted on the theory that the will is not signed at the end, or subscribed, with reference to that portion appearing below the signature of the testator, questions may well arise as to the effect of that portion as a codicil,[15] the dispositive or testamentary effect of such provision,[16] whether it is incorporated by reference and is evidence of testator's intent,[17] and the effect of the various statutory provisions,[18] by which all documents must be regulated.[19]

The question of signature by subscription resolves itself in fact into determining the intent of the testator in signing the instrument.[20] As for the validity of that portion of the proposed will which appears below the signature of testator, it is quite clear that existing rules of law hold that it shall not take effect,[21] and perhaps they should be adhered to.[22] Yet fair judicial administration requires that some

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[11]Note, 29 A.L.R. 891 (1924); *In re* Henderson's Estate, 196 Cal. 623, 238 Pac. 938 (1925); *In re* Kinney's Estate, 16 Cal.2d 50, 104 P.2d 782 (1940) (following the rule which was set forth in Lemayne v. Stanley, *infra*); Lemayne v. Stanley, 3 Lev. 1, 83 Eng. Rep 545 (1681); Mechem. *The Rule in Lemayne v. Stanley*, 29 MICH. L. REV. (1931); see also, Comment 28 MICH. L. REV. 351; Comment, 17 CAL. L. REV. 279 (1929). Armstrong v. Walton, *supra* note 1; Better v. Hirsch, *supra* note 1; (Letters without subscription, probated as ordinary wills because properly attested).

[12]*In re* George's Estate, 45 So.2d 571 (Miss. 1950); Borchers v. Borchers, *supra* note 8; Hales' Goods, 2 Ir. R. 362 (1915).

[13]See not 8 *supra;* Baker v. Baker, *supra* note 9.

[14]PAGE, WILLS § 290 (2nd ed. 1928). Lucas v. Brown, 87 Ky. 502, 219 S.W. (1920); Irwin v. Jacques, 710 Ohio St. 395, 73 N.E. 683 (1905) (Decisions holding that such provisions above as well as below are valid) *Contra*: Beaumonts' Estate, 216 Pa. 350, 65 Atl. 799 (1907).

[15]Note, 68 L.R.A. 353 (1905); Succession of Dyer, 155 La. 265, 99 So. 214 (1924); Lagrave v. Merle, 5 La. Ann. 278 (1850) (if signed).

[16]PAGE WILLS § 283 (2nd ed. 1928); Lucas v. Brown, *supra* note 14 (If the clause is dispositive, the letter is not signed at the end thereof.); Ward v. Putman, 119 Ky. 889, 85 S.W. 179 (1905); Vineland's Appeal, 118 Pa. 37, 12 Atl. 301 (1888).

[17]Note, 144 A.L.R. 714 (1943); Note, 173 A.L.R. 568 (1948); Scott v. Sastright, 305 Ky. 340, 204 S.W.2d 367 (1947).

[18]See notes 4 and 8 *supra.*

[19]See note 11 *supra.*

[20]*In re* Devlin's Estate, 198 Cal. 721, 247 Pac. 577 (1926); Hoffman v. Hoffman, *supra* note 9, (Considers the intention of testator that such shall serve as his signature); *In re* Bardner's Estate, 84 Cal. App.2d 394, 190 P.2d 629 (1948) (The intention that the document serve as his will).

[21]*In re* Chase's Estate, 124 P.2d 895, 51 Cal. App.2d 353 (1940); Bowen v. Margillo, 127 Conn. 161, 14 A.2d 724 (1940); Warren v. Sidney, 183 Miss. 669, 184 So. 806 (1938); Baker v. Baker, *supra* note 7.

[22]*In re* Stever's will, 268 App. Div. 559, 52 N.Y.S.2d 348 (1944); Sears v. Sears, 770 Ohio St. 104, 82 N.E. 1067 (1908); *In re* Bryen's *Estate,* 328 Pa. 257, 189 Atl. 17 (1937).

effect be given to the intention of the testator, where it is obvious.[23] The present decision fails to do that. Even though the testamentary intent of the post script is recognized, it is not considered for failure to meet the requirement of subscription. Yet it should be given some effect as evidence of the testator's intention.

Clinton Gay Herring.

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[23]Better v. Hirsch, *supra* note 2; *In re* Sharp's Estate, 133 Fla. 802, 183 So. 470 (1938); Briggs v. Peebles, 144 Tex. 47, 188 S.W.2d 147 (1945); *In re* Lagershauser's Estate, 224 Wis. 479, 272 N.W. 469 (1937).

BOOK REVIEWS

A Manual of Trial Technique in Administrative Proceedings and Illustrative Federal Administrative Agencies. Prepared under the auspices of the Junior Bar Section of the Bar Association of the District of Columbia, Washington, D. C. Published by the Bar Association of the District of Columbia. 1950, pp. 80, $2.00.

The practice of law before administrative agencies has been for too long a time an esoteric subject to most practitioners. In this century administrative law is performing the developing functions which equity served in the eighteenth and nineteenth centuries. The lawyer is overlooking a sizeable source of legal business if he overlooks agency practice. But in order to handle such work efficiently and adequately, he must be able to shed some of the super-technical barnacles of courtroom practice, which have been eliminated by most agencies. At the same time, the administrative field needs lawyers with a sound understanding of necessary procedural safeguards for citizens affected by agency actions.

This little booklet is valuable mainly as a preceptive analysis of one important aspect of administrative practice, trial technique. About one-half of it is an excellent article by Judge E. Barnett Prettyman, of the United States Court of Appeals for the District of Columbia Circuit, in which he discusses "some fundamentals in the technique of presenting matters to an administrative agency where a hearing is held." With his interest and wide experience in this subject, Judge Prettyman's article is valuable to both the beginner and the old hand in this field.

Hearing procedures differ with the type of proceeding: rule making, application for license, and adversary proceedings, simple or complicated. And there are important differences between an administrative proceeding and a courtroom trial; in the former, the person who hears the evidence usually does not make the final decision, which is made weeks or months after the oral hearing. The decision is not based on a simple verdict. but upon detailed findings. Although in the court the judge has no prior knowledge of the facts, the agency examiner often is the same person who made the investigation and initiated the proceedings. These factors make the record the most important feature of an agency hearing. The balance of Judge Prettyman's article is directed toward a number of practical methods of preparing that record.

The last half of this pamphlet is devoted to an outline of the organizations and features of ten characteristic, major federal agencies, and the methods of judicial review of their rules and orders. These summaries were prepared by members of the Junior Bar Section of the District of Columbia Bar, and were revised by staff attorneys of the several agencies. They condense a lot of facts in a short space, and are excellent reference material.

Most administrative law problems never reach the stage of a formal hearing; the bulk of such legal work is settled by conference or correspondence. But perhaps the most important aspect of this field of law, from the practicing lawyer's point of view, are hearing procedures. They are here analyzed, for both the young and experienced lawyer, preceptively and realistically.

*William N. Ethridge, Jr.**

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*Mississippi Supreme Court Commissioner
Jackson, Mississippi

WORKMEN'S COMPENSATION LAW OF INDIANA. By Ben F. Small. Indianapolis, Indiana, Bobbs-Merrill, 1950, pp. 617. $12.50.

Work-induced accidents resulting in death, permanent disability and impairment in contemporary American history have been appalling. The comforts and progress accompanying our industrial revolution have not been obtained without a tremendous cost in human suffering. While it is difficult to estimate accurately the proportion of the victims and their dependents covered by state workmen's compensation statutes and various federal protective enactments, the mere prolixity of the numbers serves as an index to the importance of the law of employment accident and disease. Moreover, a body of law has been built up around the fundamental Workmen's Compensation Act which must be mastered. In the short span of half a century, workmen's compensation law has come of age.

Fortunately, in recent years there have been published a few excellent works covering this important subject on a nation-wide scale. However, as the compensation act of each state differs, access merely to works on the general principles of workmen's compensation does not entirely fill the need of those persons who must handle compensation cases. They need also access to the law of the state in which they practice. Professor Small's comprehensive and lucid treatise of industrial injury law has fulfilled this need for Indiana practitioners.

In thirteen chapters this work covers the main headings of coverage, jurisdictional conflict, employment relation, personal injury, accident arising out of and in the course of employment, method of compensating injury and death, dependency, occupational disease, and procedure before the Indiana commission and courts. The study is well indexed and annotated, and for convenience has an appendix containing the full Indiana statutes, commission rules and regulations, forms, and other documentary material.

While this treatise is written primarily for Indiana attorneys, it covers the subject of industrial injury thoroughly and would be very helpful to anyone desiring to broaden his knowledge of this branch of the law. The annotations are mainly from Indiana, but leading decisions from other jurisdictions are quoted quite often. Also, detail is given not only to the law of industrial injury cases, but to practice and procedure before an industrial board.

Indiana lawyers can now be thoroughly armed when they represent a client in a case involving industrial injury or disease. It is to be hoped that the high standard of scholarly work set by this excellent book can be equaled when such a treatise is prepared for Mississippi.

*Frank E. Shanahan, Jr.**

LAW AND TACTICS IN JURY TRIALS. By F. X. Busch. Indianapolis, Indiana, Bobbs-Merrill Co., Inc., 1949, pp. 1147. $8.50

This reviewer found "Law and Tactics in Jury Trials" to be a very interesting, as well as a most informative, book Basically it is a reference book; however, this does not in any way detract from its readability.

The first hundred or so pages are devoted to the history, nature, and constitutional aspects of trial by jury, and the respective functions of court and jury. The author

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*Jackson, Mississippi.

then takes the reader completely through all the phases of such a trial—from "preparation" through "verdict"—covering such interesting and important elements as direct and cross-examination, expert and opinion testimony, argument and instructions to the jury. All of these elements are dealt with exhaustively, as is evidenced by the length of the book.

At the end of each of the various sections, are pertinent verbatim excerpts from reported cases. These are most enlightening, and make exciting reading. The author admittedly makes no attempt at a course in evidence, but many rules of evidence are necessarily referred to and explained as they bear on the subject matter of the book.

In choosing the tactics to be employed in a jury trial, much consideration must be given to the psychological effect these tactics will have on the jury. Therefore, this thought permeates the work from cover to cover: "How will the jurors accept and understand this move or that move—This objection or that objection—emphasis on this point or that point?"

All in all, it is a well written book. This reviewer especially recommends it to the young lawyer who has not yet had a great deal of actual courtroom work, for it will supply many of those details which, though most important, are not usually obtained through formal training. It should also make a valuable adjunct to the library of the older lawyer as a handy reference on points of technique and procedure, which sometimes are very difficult to locate in the reports and standard reference works.

*Wm. Byron Long, Jr.**

MELVILLE W. FULLER, CHIEF JUSTICE OF THE SUPREME COURT 1888-1910. By Willard L. King. New York, The MacMillian Company, 1950, pp. 394. $5.00.

Willard L. King, a member of the Illinois State Bar Association and the Chicago Bar Association, has given us a book which will be warmly received as a significant piece of research adding to the growing store of American legal history. A penetrating biography of the life of United State Supreme Court Chief Justice Fuller has been placed within reach of all. His research is most thorough and painstaking; he presents the facts, pulling no punches, with the exception of an understandable personal bias in favor of his subject.

Mr. King reaches back into the past, prior to to birth of Justice Fuller, to give us a rather complete ancestoral background, an indication of the people who influenced the Chief Justice's life in his early days. The readers mind is immediately projected into the enviromental pattern encountered by Fuller. His early life as a boy in Maine, the family tragedy of the divorce of his parents, his education and activities at college are depicted with a skill which lifts the veil of time and gives the reader the feeling of being present on the scene.

One realizes, as the portrayal of Justice Fuller's life unfolds, that his greatest asset was his executive ability. He developed the capacity of having a marked respect for the opinion of others, although, early in his career, he was inclined to be rather short and argumentative with those whose political opinion differed from his.

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*Barrett & Long, Tupelo, Mississippi

It took the Chief Justice some time to learn "to disagree without being disagreeable." Later, it was this quality which enabled him to maintain a fine spirit of cooperation among his colleagues on the Supreme Court. His ability to suave hurt feelings, coupled with his capacity shrewdly to analyze the personality of the individual with which he was dealing, enabled Fuller to become an executive of no small stature. "He had the business of the Court at his fingers ends, he was perfectly courageous, prompt, decided. He turned off the matters that daily called for action easily, swiftly, with the least possible friction, with inestimable good humor and with a humor that relieved any tension with a laugh."

The periods in the life of the Chief Justice, as treated by Mr. King, may be summarized in three headings: the period of education and his early practice of law; his political activities and the practice of law in Chicago; and his appointment and service as Chief Justice of the United States. The author surveys the well-known decisions in which Fuller participated and paints a clear background of the era indicating the social import of these decisions.

The confidence Fuller had in his own mental capabilities coupled with his ability to direct the workings of the court and the deep sense of the dignity he brought to the court are reflected throughout the book. We are brought to the realization that Chief Justice Fuller was one of our better Supreme Court Justices, and that his personal force, as well as, his executive ability made it possible to guide the court through a period of great difficulty. We thus find that Melville W. Fuller was a public servant who conscientiously and efficiently served his country.

*Arthur B. Custy**

*Acting Associate Professor of Law
University, Mississippi

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